DOCKET

No. 07-751

Title:	Cordell Pearson, et al., Petitioners v. Afton Callahan
Docketed:	December 6, 2007
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(06-4135)
Decision Date:	July 16, 2007
Rehearing Denied:	September 6, 2007

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 4 2007	Petition for a writ of certiorari filed. (Response due January 7, 2008)
Jan 3 2008	Order extending time to file response to petition to and including February 6, 2008.
Feb 6 2008	Brief of respondent Afton Callahan in opposition filed.
Feb 14 2008	Reply of petitioners Cordell Pearson, et al. filed.
Feb 20 2008	DISTRIBUTED for Conference of March 14, 2008.
Mar 17 2008	DISTRIBUTED for Conference of March 21, 2008.
Mar 24 2008	Petition GRANTED In addition to the questions presented by the petition, the parties are directed to brief and argue the following Question: "Whether the Court's decision in Saucier v. Katz, 533 U. S. 194 (2001) should be overruled? .
Apr 30 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including June 6, 2008.
Jun 6 2008	Joint appendix filed. (Statement of costs filed)
Jun 6 2008	Brief of petitioners Cordell Pearson, et al. filed.
Jun 6 2008	Brief amicus curiae of Texas Association of School Boards in support of neither party filed.
Jun 9 2008	SET FOR ARGUMENT ON Tuesday, October 14, 2008.
Jun 12 2008	Brief amici curiae of Illinois, et al. filed.
Jun 13 2008	Brief amicus curiae of United States filed.
Jun 13 2008	Brief amici curiae of National Association of Counties, et al. filed.
Jun 30 2008	The time to file respondent's brief on the merits is extended to and including August 6, 2008.
Jul 3 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 17 2008	CIRCULATED
Aug 4 2008	Record received from the U.S.C.A. for the Tenth Circuit. (1 box)

Aug 6 2008	Brief of respondent Afton Callahan filed. (Distributed)
Aug 11 2008	Brief amici curiae of National Police Accountability Project, et al. filed. (Distributed)
Aug 11 2008	Brief amicus curiae of ACLU filed. (Distributed)
Aug 13 2008	Brief amicus curiae of Liberty Legal Institute filed. (Distributed).
Aug 13 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed).
Aug 13 2008	Brief amicus curiae of National Campaign to Restore Civil Rights filed. (Distributed).
Aug 18 2008	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 5 2008	Reply of petitioners Cordell Pearson, et al. filed. (Distributed)
Sep 11 2008	Record received from U.S.D.C. for the District of Utah. (1 envelope containing 1 volume.) The remainder of this record is electronically filed.
Oct 14 2008	Argued. For petitioners: Peter Stirba, Salt Lake City, Utah; and Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Theodore P. Metzler, Jr., Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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No. 07-___

(1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

CORDELL PEARSON; MARTY GLEAVE;
DWIGHT JENKINS; CLARK THOMAS;
and JEFFREY WHATCOTT,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Several lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement. Does this exception authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside (as the Sixth and Seventh Circuits have held), or does the warrantless entry in such circumstances violate the Fourth Amendment (as the Tenth Circuit held below)?

(2) Did the Tenth Circuit properly deny qualified immunity when the only decisions directly on point had all upheld similar warrantless entries?

PARTIES TO THE PROCEEDING

Petitioners are five individual law enforcement officers: Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, and Jeffrey Whatcott. Respondent is Afton Callahan, an individual.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 494 F.3d 891. It is reprinted in the Appendix at Pet. App. 1.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 16, 2007. The Tenth Circuit denied a petition for rehearing on September 6, 2007. Pet. App. 60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT

This is a Fourth Amendment case involving an undercover drug buy. On March 19, 2002, confidential informant Brian Bartholomew contacted agents of the Central Utah Narcotics Task Force to inform them that he had arranged to purchase narcotics from respondent Afton Callahan later that day at Callahan's trailer home. Members of the Task Force provided Bartholomew with a hidden microphone and transmitter and drove him to Callahan's home. The agents instructed Bartholomew to purchase the narcotics from Callahan and then to give the agents a prearranged signal when the purchase was complete.

Bartholomew knocked on the door and was invited inside by Callahan's daughter. After Bartholomew stepped inside, Callahan sold Bartholomew

a bag of methamphetamine for $100. When Bartholomew gave the prearranged signal, members of the Task Force entered Callahan's home. Upon entering, the officers personally observed Callahan holding a plastic bag later confirmed to contain methamphetamine. A search of the home pursuant to Callahan's consent revealed evidence that Callahan had been possessing and distributing methamphetamine from his home. At no time did the police obtain a warrant.

Callahan was charged in Utah state court with possession and distribution of methamphetamine. The state trial court ruled that the evidence of narcotics was admissible because exigent circumstances permitted the warrantless entry into Callahan's home. Callahan entered a conditional guilty plea allowing him to challenge the trial court's Fourth Amendment ruling. On appeal, the State agreed that exigent circumstances did not exist and instead argued that the evidence should be admitted under the inevitable discovery doctrine. The Utah Court of Appeals ruled that the inevitable discovery doctrine was inapplicable and remanded with instructions to grant Callahan's motion to suppress. *State v. Callahan*, 93 P.3d 103, 107 (Ut. App. 2004).

Callahan then filed a civil suit in the United States District Court for the District of Utah against the five individual officers who participated in the search of his home, the Central Utah Narcotics Task Force, and the several Counties that participate in the Task Force. Callahan alleged a violation of his Fourth Amendment rights and asserted a claim

under 42 U.S.C. § 1983. District Judge Paul G. Cassell granted the defendants-petitioners' motion for summary judgment and found that the defendants were entitled to qualified immunity. Pet. App. 31.

According to Judge Cassell, the constitutionality of the warrantless entry depended on whether the Supreme Court would eventually accept the "consent once removed" exception to the warrant requirement already adopted by the Sixth, Seventh, and Ninth Circuits. Pet. App. 52-53. "Ultimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment[,]" Judge Cassell explained. Pet. App. 53. "[I]f confronted with a case squarely presenting the 'consent-once-removed' doctrine, the Supreme Court might well" disagree with those circuits and find that no such exception exists. Pet. App. 52.

Instead of resolving the constitutionality of the entry, Judge Cassell assumed that the Supreme Court would eventually reject the "consent once removed" doctrine and instead focused on whether the search had violated Callahan's "clearly established" rights. Pet. App. 53. Judge Cassell reasoned that the caselaw from the Sixth, Seventh, and Ninth Circuits recognizing a "consent once removed" exception prevented the warrantless entry from violating a clearly established right:

> [O]n the specifics of this case, the officers had a reasonable argument that the "consent-once-removed" doctrine justified their actions. Indeed, it is clear that in [the] Sixth,

> Seventh and Ninth Circuits their actions would have been fully consistent with the Constitution. Put another way, unless and until the Tenth Circuit or the Supreme Court rejects the "consent-once-removed" doctrine, a police officer in Utah relying on the doctrine (in a case where the doctrine factually applies) has not violated a clearly established right.

Pet. App. 55-56. Judge Cassell then granted summary judgment in favor of the entity defendants under the principles of *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 680, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Pet. App. 57-58.

A divided Tenth Circuit reversed in a decision by Judge Murguia, sitting by designation. Pet. App. 2.[1] Judge Murguia ruled that the "consent once removed" doctrine did not apply because the initial entry was made by a confidential informant instead of an undercover police officer. Pet. App. 14. The entry would have been constitutional if the initial entry had been made by a police officer because "the consent granted to the hypothetical police officer would have covered additional backup officers." Pet. App. 12. However, the "distinct obligations and powers" of confidential informants made the exception

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[1] Callahan's appeal before the Tenth Circuit did not address the liability of the entity defendants, and those issues are therefore not before the Court. The only remaining defendants are the petitioners, the five individual law enforcement officers involved in the search of Callahan's home.

inapplicable when an informant had made the initial entry into the home instead of a police officer. Pet. App. 13.

The panel next concluded that the warrantless entry had violated Callahan's clearly established constitutional rights so that no qualified immunity defense applied. The panel defined the relevant constitutional right as "the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15. According to Judge Murguia, it was clearly established in the Tenth Circuit that "the only two exceptions to the warrant requirement are consent and exigent circumstances." Pet. App. 17. Thus, a reasonable officer in the Tenth Circuit would realize it was improper to rely on the "consent once removed" exception recognized in other circuits. Pet. App. 17.

Judge Kelly dissented. Pet. App. 18. Judge Kelly agreed with the Sixth and Seventh Circuit cases expressly recognizing the "consent once removed" exception when the initial entry was made by an informant. According to Judge Kelly, distinguishing entry by an informant from entry by an undercover officer was unprincipled and "create[d] odd results." Pet. App. 25. Judge Kelly also concluded that the officers should be entitled to qualified immunity:

> [B]ecause neither the Supreme Court nor the Tenth Circuit has heretofore addressed the propriety of the consent once removed doctrine as applied to confidential informants, and the clear weight of authority from other circuits strongly suggested that the Task

> Force's actions in this case were legal, I would hold that the right at issue was not clearly established and would affirm the grant of qualified immunity.

Pet. App. 29.

The Tenth Circuit denied a Petition for Rehearing on September 6, 2007. Pet. App. 60.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER THE "CONSENT ONCE REMOVED" DOCTRINE OF FOURTH AMENDMENT LAW.

Over the last twenty-five years, lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement.[2] The exception allows narcotics investigators to make a warrantless entry into a home after an undercover agent personally observes narcotics inside the home. The doctrine applies when "the agent (or informant)

[2] The Sixth, Seventh, Ninth, and Tenth Circuits have recognized the doctrine in some form, as have the Supreme Courts of New Jersey and Wisconsin. *See, e.g., United States v. Romero*, 452 F.3d 610 (6th Cir. 2006); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994).

entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers." *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987). Four federal circuits and two state supreme courts have expressly recognized the "consent once removed" doctrine at least in some form. The Supreme Court has never recognized or even addressed this exception.

The Court should grant certiorari in this case to resolve the split among the circuits over use of this exception when the undercover individual is an informant instead of a law enforcement officer. The Sixth Circuit and Seventh Circuit both have expressly held that the "consent once removed" doctrine permits a warrantless entry into the home when the undercover individual is an informant. In *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986), Judge Posner concluded that the doctrine "extends to the case where the initial, consensual entry is by a confidential informant." An undercover agent could enter with consent and then summon other officers, and it made "no difference" that the person was an informant instead of a law enforcement officer. *Id.* The Seventh Circuit reaffirmed the principle in *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1994) and *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995).

The Sixth Circuit adopted the Seventh Circuit's approach in *United States v. Yoon*, 398 F.3d 802 (6th

Cir. 2005). *Yoon* noted that in a prior case, the Sixth Circuit had recognized the "consent once removed" doctrine in a case involving undercover agents and informants together. *See id.* at 807-08 (citing *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000)). The *Yoon* Court decided to "extend that concept to cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest." *Id.* at 807. The Sixth Circuit thus embraced the rule of the Seventh Circuit: "This Court agrees with and adopts the sound reasoning of the Seventh Circuit in *Paul, Jachimko,* and *Akinsanya.*" *Id.* at 807.

The Tenth Circuit decision below expressly disagreed with these rulings. Judge Murguia's majority opinion concluded that the distinction between government agents and informants was critical and that the "consent once removed" doctrine could not apply when the undercover entry was made by an informant. Judge Murguia characterized the Seventh Circuit and Sixth Circuit decisions applying the doctrine to undercover informants as "unconvincing." Pet. App. 12. According to Judge Murguia, the distinctions between the "obligations and powers" of private persons and the police "must also be reflected in a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house." Pet. App. 13. Thus in the Tenth Circuit the "consent once removed" doctrine can be

used when the undercover individual is a police officer but not when he is a confidential informant.

This Court should grant certiorari to resolve the clear split in the circuits. The division between the Sixth and Seventh Circuits on one hand and the Tenth Circuit on the other leaves the "consent once removed" doctrine in a state of considerable uncertainty. There are obvious reasons for police to use informants to set up and execute undercover drug buys. Undercover individuals must trick sellers of narcotics into believing that they are legitimate buyers rather than police officers or their agents. This is often easier for informants than police officers because informants can be members of the community already widely known as past purchasers of narcotics. *See generally* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 651-54 (2004) (describing common uses of informants). The lower court disagreement on the use of the "consent once removed" exception in this setting creates great uncertainty as to the legality of this important law enforcement technique.

The circuit split is particularly important because the "consent once removed" doctrine has long been plagued by legal confusion and uncertainty. Judges have disagreed about its conceptual basis and whether it should exist at all. Some courts have justified the doctrine on the ground that a person's privacy interest is "fatally compromised when the owner admits a confidential informant and proudly

displays contraband to him." *Paul*, 808 F.2d at 648 (Posner, J.). Other courts have grounded the rule in general reasonableness. *State v. Henry*, 627 A.2d 125, 132 (N.J. 1993) (concluding that a consent-once-removed entry was "reasonable" in light of all of the circumstances). Judge Cornelia Kennedy has argued that the exception is best understood as "a combination of a sort of 'quasi exigent circumstances and consent.'" *Yoon*, 398 F.3d at 809, n.2 (Kennedy, J., concurring). On the other hand, Judge Nathaniel Jones has reasoned that the "consent once removed" exception should not exist at all and has no place in Fourth Amendment law. *See United States v. Pollard*, 215 F.3d 643, 649 (6th Cir. 2000) (Jones, J., dissenting) (contending that the doctrine "represents an unjustified extension of our traditional exigent circumstances jurisprudence.")

Lower court confusion is understandable because the Supreme Court has never addressed the constitutionality of "consent once removed" searches. The doctrine has developed in the lower courts for over two decades without this Court's review. As then-Judge (now Professor) Paul Cassell stated when this case was before the district court, "[u]ltimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment." Pet. App. 53. That time should be now. Supreme Court review is needed to address the confusion and to provide the police with clear legal guidance.

Further percolation of this issue is unnecessary for two reasons. First, lower courts have debated the merits of the exception extensively for more than two decades. The resulting opinions explore the doctrine from many different perspectives at considerable length, taking different views on whether the doctrine should exist and how broadly it should extend. *See United States v. Romero*, 452 F.3d 610 (6th Cir. 2006); *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005); *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995); *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1993); *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987); *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986); *United States v. Janik*, 723 F.2d 537 (7th Cir. 1983); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007); *United States v. Samet*, 794 F.Supp. 176 (E.D.Va. 1992); *United States v. Herrera-Corral*, 2002 WL 69491 (N.D.Ill. 2002); *United States v. McCalla*, 1996 WL 699629 (N.D.Ill. 1996); *United States v. Anhalt*, 814 F.Supp. 750 (N.D.Ill. 1993) (rev'd by *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1993)); *United States v. Santiago*, 1993 WL 75140 (N.D.Ill. 1993); *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994); *Brown v. United States*, 932 A.2d 521, n.8 (D.C. App. 2007); *Smith v. State*, 857 A.2d 1224 (Md. App. 2004); *State v. Penalber*, 898 A.2d 538 (N.J. Super. 2006); *Commonwealth v. Moye*, 586 A.2d 406 (Pa. Super. 1990); *State v. Heriot*, 2005 WL 1131731 (Ohio

App. 2005) (unpublished); *People v. Finley*, 687 N.E.2d 1154 (Ill. App. 1997); *People v. Galdine*, 571 N.E.2d 182 (Ill. App. 1991); *Williams v. State*, 937 S.W.2d 23 (Tex. App. 1st Dist. 1996); *People v. Cespedes*, 191 Cal.App. 3d 768 (Cal. App. 4th Dist. 1987).

Further percolation is also unnecessary because the Tenth Circuit's decision may have a substantial chilling effect. Undercover drug buys are necessarily planned out ahead of time; officers choose when and how they occur. Such techniques are unusually sensitive to adverse legal rulings. A court decision from one circuit expressly rejecting a particular technique is unusually likely to be noted by those in other circuits who are in charge of planning investigations. That possibility is particularly significant when the adverse ruling not only rejects the legality of the technique but also denies qualified immunity to the officers involved. In such circumstances, an adverse ruling may overdeter police; one decision may strongly discourage police departments in other circuits from relying on the technique (thus avoiding legal challenges to it) in future investigations. The potential chilling effect of the Tenth Circuit's decision makes this case the best vehicle for settling the legality of the "consent once removed" doctrine.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE TENTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY AND THEREBY RESOLVE THE THREE-WAY DISAGREEMENT IN THE LOWER COURTS AS TO PROPER SOURCES OF CLEARLY ESTABLISHED LAW.

An improper denial of qualified immunity provides an independent basis for certiorari because a misapplication of qualified immunity standards creates the functional equivalent of a circuit split. An improper denial of qualified immunity in the Fourth Amendment context overdeters the police from going close to the line of legality; the threat of liability forces the police to change their practices much like a decision altering substantive Fourth Amendment law. The Court has recognized this principle by repeatedly granting certiorari to review denials of qualified immunity absent any claim of disagreement among the circuits. *See, e.g.*, *Scott v. Harris*, 127 S.Ct. 468, 166 L.Ed.2d 333 (2006) (granting certiorari to review denial of qualified immunity in a Fourth Amendment case); *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (granting certiorari and summarily reversing Fourth Amendment decision that had denied qualified immunity); *Groh v. Ramirez*, 537 U.S. 1231, 123 S.Ct. 1354, 155 L.Ed.2d 195 (2003) (granting certiorari in Fourth Amendment qualified immunity decision to review Ninth Circuit decision denying qualified immunity).

The Tenth Circuit's denial of qualified immunity calls out for this Court's review exactly as did the circuit court decisions in *Scott*, *Brosseau*, and *Groh*. The Tenth Circuit below made precisely the same conceptual error as did the lower courts in those cases: It defined the "clearly established" constitutional right in the most abstract way possible. As this Court explained in *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), allowing plaintiffs to allege violations of "extremely abstract rights" would effectively "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability[.]" In clear disregard of this guidance, the Tenth Circuit chose the most abstract level of generality possible by merely restating the language of the Fourth Amendment. According to the panel majority below, "the relevant right is the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15.

Remarkably, the Tenth Circuit's qualified immunity analysis included no specific application to the facts of the case. The panel ruled that qualified immunity was improper simply because "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id.* Because the "consent once removed" doctrine had not been "established" by either the Supreme Court or the Tenth Circuit, it was necessarily "clearly established" that it had no application to the facts of this case.

This was clearly incorrect, as Judge Kelly explained in his dissent:

> Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause. As the district court observed, no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right.

Pet. App. 27 (Kelly, J., dissenting).

Given the precedents that existed in March 2002, when the entry occurred, a reasonable officer would have concluded that the petitioners' conduct was constitutional. Although the Supreme Court and the Tenth Circuit had never addressed the "consent once removed" doctrine, every court to have addressed the issue had recognized the exception. Three federal circuits already had embraced it, and Judge Posner had held that it explicitly covered cases when the initial entry was made by a confidential informant. *See United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986). No case had rejected the doctrine in a case with similar facts. Indeed, not long after the warrantless entry in this case, a journal article expressly instructed officers that the doctrine *permitted* searches when the initial consent was obtained by an informant.

Hendrie, *Consent Once Removed*, FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN, February 2003, at 24-25 ("There is no requirement that the person obtaining the original consent be an officer of the law. The person obtaining consent could be an informant.")

As Judge Cassell and Judge Kelly both recognized, the petitioners were properly entitled to qualified immunity in these circumstances. The panel's error is sufficiently plain that it stands alone as a basis for granting the petition. *See* Krumholz, *Divided Tenth Circuit Panel Gets One Wrong, Horribly Wrong*, ROCKY MOUNTAIN APPELLATE BLOG, July 2007, available at http://rockymtnappellateblog.typepad.com/rocky_mountain_appellate_/2007/07/index.html (describing the panel's qualified immunity analysis as a "stunningly bad" and "utterly indefensible" decision that "completely guts qualified immunity").

Granting certiorari would also permit the Court to address the three-way division among the Courts of Appeals on whether and how decisions outside the home circuit create "clearly established" law. The problem is an important one: When applying the qualified immunity test, to what extent should the state of the law be informed by decisions other than those of the Supreme Court and the home circuit? Should the law of other circuits, state supreme courts, federal district courts, and lower state courts factor into whether the law is "clearly established?" Or are these decisions irrelevant? The question has obvious importance in this case because qualified

immunity relies in part on the caselaw outside the Tenth Circuit that expressly upheld the constitutionality of the technique used by the Task Force.

Although the Supreme Court has provided occasional guidance on how to determine clearly established law,[3] the circuits have divided on the meaning of that guidance and have adopted a wide range of different legal tests in response to it. For example, the Tenth Circuit below recognized the Circuit's usual rule that "for a right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007) (cited in *Callahan*, 494 F.3d at 899).[4]

The Seventh Circuit and the Ninth Circuit take a roughly similar approach. In those circuits, courts can consider all relevant caselaw whether from another circuit, a state court, or a district court. *See, e.g., Tekle ex rel. Tekle v. United States*, 457 F.3d 1088, 1096 (9th Cir. 2006) ("In the absence of binding precedent, we look to whatever decisional law is

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[3] *See Grayden v. Rhodes*, 345 F.3d 1225, 1251 n.4 (11th Cir. 2003) (summarizing the Supreme Court's guidance).

[4] The proper test in the Tenth Circuit is somewhat unclear because different panels have expressed the test differently. For a thorough discussion of Tenth Circuit caselaw, *see Prison Legal News, Inc. v. Simmons*, 401 F.Supp.2d 1181, 1189-92 (D. Kan. 2005).

available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts."); *Jacobs v. City of Chicago*, 215 F.3d 758, 767 (7th Cir. 2000) (Courts "broaden our survey to include all relevant caselaw in order to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.")

In the Eleventh Circuit, by contrast, the only source of law that is relevant beyond the Supreme Court and the home circuit is the state Supreme Court in the state where the event occurred. Courts looking for "clearly established" law do not consider the law of other circuits or other state courts. *See Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc) ("When case law is needed to 'clearly establish' the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state. . . . Each jurisdiction has its own body of law, and splits between jurisdictions on matters of law are not uncommon. We do not expect public officials to sort out the law of every jurisdiction in the country.") *See also Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003).

The Second Circuit takes yet another approach. In the Second Circuit, the only sources that can create "clearly established" law are the U.S. Supreme

Court and the Second Circuit. Decisions by other circuits, state courts, and federal district courts are irrelevant to whether the law is "clearly established." *See Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."). *See also Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003); *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998).

This disagreement among the circuits has real and important consequences. Fourth Amendment caselaw develops in a case-by-case fashion, and the relevance of the first lower court decisions to the outcomes of later qualified immunity defenses is a very important question in practice. When a lower court approves a new investigative technique, police officers in other circuits may reasonably attempt to rely on that precedent. On the other hand, when a lower court rules that a practice is illegal, plaintiffs around the country may reasonably attempt to rely on it in civil cases against the police.

Given the current lower court disagreement, however, the strength of any qualified immunity defense may hinge on where the lawsuit is filed. The initial decision may be relevant to a qualified immunity defense in the Seventh, Ninth, and Tenth Circuits; irrelevant in the Second Circuit; and relevant in the Eleventh Circuit only if it is a decision of the state Supreme Court in that state. This area

demands uniformity, and a grant of certiorari in this case could provide the Court with an excellent vehicle to address this issue.

In sum, the Court should grant the petition to resolve the circuit split on the "consent once removed" exception; to correct the Tenth Circuit's improper denial of qualified immunity; and to address the disagreement in the circuits as to how courts determine clearly established law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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494 F.3d 891

United States Court of Appeals, Tenth Circuit.

Afton CALLAHAN, Plaintiff-Appellant,

v.

MILLARD COUNTY; The Central Utah Narcotics Task Force; Sevier County; Piute County; Mt. Pleasant City; Wayne County; Richfield City; Salina City; Gunnison City; Ephraim City; Cordell Pearson, in his official and individual capacity; Marty Gleave, in his official and individual capacity; Clark Thomas in his official and individual capacity; Dwight Jenkins, in his official and individual capacity; Jeffrey Whatcott, in his official and individual capacity; and John Does I-IX in their official and individual capacities, Defendants-Appellees.

No. 06-4135.

July 16, 2007.

James K. Slavens, Fillmore, UT, for Plaintiff-Appellant.

Peter Stirba (Barbara L. Townsend and Meb W. Anderson with him on the brief), Stirba & Associates, Salt Lake City, UT, for Defendants-Appellees.

Before KELLY and EBEL, Circuit Judges, and MURGUIA,* District Judge.

MURGUIA, District Judge.

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* The Honorable Carlos Murguia, District Judge, United States District Court for the District of Kansas, sitting by designation.

In this civil rights action, Plaintiff-Appellant Afton Callahan appeals from the district court's grant of summary judgment in favor of the numerous Defendant-Appellees. The district court held that the individual officers were entitled to qualified immunity because Mr. Callahan did not establish that the officers violated a clearly established right. Holding that the district court was correct in its determination that Mr. Callahan's constitutional rights were violated, but incorrect in its determination that these rights were not clearly established, we reverse in part and remand.

Background

This appeal evolves from a police raid of Mr. Callahan's home on March 19, 2002. Earlier in the day, a confidential informant – who assisted the Central Utah Narcotics Task Force after being charged with possession of methamphetamine – saw Mr. Callahan and discussed a potential sale of methamphetamine later that day. The confidential informant then informed an officer of the task force of the conversation.

According to the findings of the district court, the confidential informant began that evening by drinking "between six to eight beers in three hours." He then went to Mr. Callahan's home, where he "ingested or tasted a sample of the methamphetamine." After establishing that he could purchase methamphetamine that evening, the confidential informant left Mr.

Callahan's home to report the plan of purchasing a gram of methamphetamine for $100 to the task force.

During their conversations with the informant, the officers learned that he was intoxicated. Concerned about his competency, the officers supplied the confidential informant with coffee and monitored him. They were unaware that he also had ingested methamphetamine.

Despite the confidential informant's condition, the officers continued with the planned drug transaction. They wired the confidential informant, gave him a marked $100 bill, and worked out a signal for him to give the officers once the exchange was completed. The officers then drove the confidential informant to Mr. Callahan's home.

Inside the home, the confidential informant asked Mr. Callahan for methamphetamine. Mr. Callahan retrieved a quantity of drugs. In exchange for a portion of the quantity, the confidential informant gave Mr. Callahan the marked bill. After the deal was completed, the confidential informant gave a variation of the pre-arranged signal to the task force officers.

Hearing the signal, the officers entered Mr. Callahan's home through a porch door. Once inside, they ordered the confidential informant, Mr. Callahan, and two other individuals to the floor. During their entry, the officers saw Mr. Callahan drop a plastic bag, which they later confirmed contained methamphetamine. After the four persons were on

the floor, the officers conducted a protective sweep of the home. The Utah Court of Appeals later determined that Mr. Callahan consented to the protective sweep.

As a result of the search of Mr. Callahan and his home, the officers found evidence of a drug sale and possession. On the confidential informant, they found a small bag of methamphetamine. On Mr. Callahan, they found the marked bill. In Mr. Callahan's home, they found drug syringes. The officers did not have an arrest or search warrant at any time during these events.

Based on this evidence, Mr. Callahan was charged with possession and distribution of methamphetamine. The trial court found that the evidence was admissible because the existence of exigent circumstances made the search reasonable despite the absence of a warrant. The Utah Court of Appeals reversed this decision and Mr. Callahan's subsequent conviction. Notably, the Utah Attorney General's office conceded on appeal that no exigent circumstances existed, instead arguing that the evidence would have been discovered inevitably. The court of appeals disagreed and applied the Attorney General's concession that there were no exigent circumstances.

Applying the ruling of the Utah Court of Appeals, Mr. Callahan filed claims in the United States Court for the District of Utah. Mr. Callahan alleged that the actions of the task force violated his constitutional rights under the Fourth and Fourteenth

Amendments. Additionally, Mr. Callahan brought claims against municipalities for failure to supervise the task force and several state law claims.

On matters not on appeal, the district court dismissed Mr. Callahan's claims against the municipalities because Mr. Callahan did not show any official policy or custom related to the actions of the task force. Combined with the dismissal of the claims against the task force under qualified immunity – as later discussed – the district court declined to exercise jurisdiction over Mr. Callahan's state law claims. This closed Mr. Callahan's case.

Regarding the claims against the task force, the district court dismissed the claims because it found that qualified immunity shielded the officers. In so doing, it found that despite an assumption that the task force violated Mr. Callahan's constitutional rights, those constitutional rights were not clearly established. Specifically, the district court examined the application of the "consent-once-removed" doctrine, finding that although three circuit courts have upheld the doctrine, the recent Supreme Court decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), allowed the district court to assume Mr. Callahan's constitutional rights were violated. On the other hand, the approval of the doctrine by three circuit courts prevented the district court from finding that those rights were clearly established.

On appeal, Mr. Callahan contends that summary judgment should not have been granted based on qualified immunity derived from the "consent once removed" doctrine. This argument consists of two components. First, from Mr. Callahan's perspective, it is clear that the actions of the task force violated his constitutional rights under the Fourth Amendment. Second, Mr. Callahan contends that because Tenth Circuit law requires exceptions to the warrant requirement of the Fourth Amendment be well delineated and carefully drawn, the adoption of the doctrine by other circuits is irrelevant.

Discussion

When reviewing summary judgment orders based on qualified immunity, the approach differs from other summary judgment decisions. *Cortez v. McCauley,* 478 F.3d 1108, 1114 (10th Cir.2007). Once a qualified immunity defense is asserted, the burden shifts to the plaintiff. First, the plaintiff must "establish that the defendant violated a constitutional right." *Id.* (citing *Reynolds v. Powell,* 370 F.3d 1028, 1030 (10th Cir.2004)). If the plaintiff fails to satisfy this initial requirement, the court's inquiry ends. *Cortez,* 478 F.3d at 1114 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.") (quoting *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). If the plaintiff establishes that a constitutional right was violated, then the plaintiff must

also show that the violated right was clearly established. *Cortez,* 478 F.3d at 1114. Whether the right was clearly established is examined under the "specific context of the case, not as a broad general proposition." *Id.* (quoting *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation." *Id.* If reasonable officers would not have been aware of the clearly unlawful nature of their actions, qualified immunity applies and summary judgment would be appropriate. *Id.* (citing *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

Even under this framework for analyzing qualified immunity, it remains that a district court's determination of qualified immunity is a question of law that we review de novo. *Cortez,* 478 F.3d at 1115 (citing *Bisbee v. Bey,* 39 F.3d 1096, 1099 (10th Cir.1994)). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "We review the evidence in the light most favorable to the nonmoving party." *Cortez,* 478 F.3d at 1115.

I. The actions of the Task Force violated Mr. Callahan's constitutional rights.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. When examining a search or seizure, the central question is whether the actions were reasonable. *United States v. McCullough,* 457 F.3d 1150, 1163 (10th Cir.2006) (citing *Illinois v. McArthur,* 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001); *Texas v. Brown,* 460 U.S. 730, 739, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)). Courts continually have viewed the warrantless entry into a house as presumptively unreasonable. *Brigham City v. Stuart,* ___ U.S. ___, 126 S.Ct. 1943, 1947, 164 L.Ed.2d 650 (2006); *United States v. Walker,* 474 F.3d 1249, 1252 (10th Cir.2007) ("It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.") (noting that the sentence is a quotation from *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)); *Galindo v. Town of Silver City,* 127 Fed.Appx. 459, 465 (10th Cir.2005) (applying this in the context of qualified immunity). This presumption results from the understanding that "the home is entitled to the greatest Fourth Amendment protection." *United States v. Najar,* 451 F.3d 710, 712-13 (10th Cir.2006) (citing *Payton,* 445 U.S. at 585, 100 S.Ct. 1371 ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *Kyllo v. United*

States, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.")).

This presumption that a warrantless search of a house is unreasonable can be overcome in certain circumstances. *Walker,* 474 F.3d at 1252 (citing *Coolidge v. New Hampshire,* 403 U.S. 443, 474-75, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). These circumstances require the government actors to demonstrate that the search "falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'" *Id.* (quoting *Coolidge,* 403 U.S. at 474-75, 91 S.Ct. 2022); *United States v. Sawyer,* 441 F.3d 890, 893-94 (10th Cir.2006) ("It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is *per se* unreasonable subject to only a few specifically established and well-delineated exceptions."); *Fuerschbach v. Sw. Airlines Co.,* 439 F.3d 1197, 1203 (10th Cir.2006) (discussing these exceptions in the context of qualified immunity). The exceptions based on exigent circumstances adopted by the Supreme Court include the hot pursuit of a fleeing felon, the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to police officers or other people inside or outside the home. *United States v. Thomas,* 372 F.3d

1173, 1177 (10th Cir.2004) (citing *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990)). Additional factors in analyzing the exceptions based on exigent circumstances are that the circumstance may not be "subject to police manipulation or abuse," or "motivated by an intent to arrest and seize evidence." *United States v. Zogmaister*, 90 Fed.Appx. 325, 330-31 (10th Cir.2004) (citing *United States v. Aquino*, 836 F.2d 1268, 1272 (10th Cir.1988); *United States v. Smith*, 797 F.2d 836, 840 (10th Cir.1986)).

Even with these additional factors, the central question remains whether the search was reasonable. The focus simply shifts to whether "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City*, 126 S.Ct. at 1947 (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). Thus, to find that a new exception is warranted requires a balancing of private interests and unique public safety concerns. *Fuerschbach*, 439 F.3d at 1203.

It is undisputed that the task force officers entered Mr. Callahan's house without a warrant. Presently, they do not argue that an established exception based on exigent circumstances made this entry reasonable. Instead, the officers ask this Circuit to join other circuits in their approval of the "consent-once-removed" doctrine.

The "consent-once-removed" doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. *United States v. Pollard,* 215 F.3d 643, 648 (6th Cir.2000); *United States v. Diaz,* 814 F.2d 454, 459 (7th Cir.1987); *United States v. Bramble,* 103 F.3d 1475, 1478 (9th Cir.1996). The Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers. *See United States v. Paul,* 808 F.2d 645, 648 (7th Cir.1986); *United States v. Yoon,* 398 F.3d 802, 807 (6th Cir.2005).

We find the distinctions between an officer and an informant summoning additional officers to be significant. Had the person inside Mr. Callahan's home been an undercover officer, no extension of our case law would be necessary. Mr. Callahan would have consented to opening his home to the police. Consent is a well-established method of conducting a reasonable search, despite lacking a warrant. *United States v. Ringold,* 335 F.3d 1168, 1174 (10th Cir.2003) ("It has long been established that an officer may conduct a warrantless search consistent with the Fourth Amendment if the challenging party has previously given his or her voluntary consent to that search."). Tenth Circuit precedent permits the police to use deception to gain such consent. *See Pleasant v. Lovell,* 876 F.2d 787, 802 (10th Cir.1989). *But see Butler v. Compton,* 158 Fed.Appx. 108, 111 (10th

Cir.2005) (citing Sixth Circuit case law for the statement "[t]o be valid, however, the consent must be 'unequivocally, specifically, and intelligently given . . .' [m]oreover, the consent must be 'uncontaminated by duress, coercion, or trickery.'"). Once lawfully inside the home, an officer may effect a warrantless arrest that is supported by probable cause. *United States v. Cruz-Mendez,* 467 F.3d 1260, 1269 (10th Cir.2006). We have never drawn a constitutional distinction between an entry or search by an individual police officer and an entry or search by several police officers. Thus, the consent granted to the hypothetical undercover officer would have covered additional backup officers without any need for additional exceptions to the warrant requirement.

On the other hand, the invitation of an informant into a house who then in turn invites the police, which are the present facts, would require an expansion of the consent exception. In this context, the person with authority to consent never consented to the entry of police into the house. Other courts have overcome this distinction by noting that a state may grant the power to arrest to the police as well as its citizens, and if the informant has the power to arrest, then an informant must be capable of summoning the police. *Yoon,* 398 F.3d at 810-11. This logic is unconvincing. That a citizen has the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state. *Cf. Arnsberg v. United States,* 757 F.2d 971, 979 (9th Cir.1985) (law enforcement officers have "obligations, such as the

duty to execute warrants, which private citizens lack; those obligations make the law of the citizen arrests an inappropriate instrument for determining FTCA liability"); *Caban v. United States,* 728 F.2d 68, 73-74 (2d Cir.1984) (immigration officers have different privileges and duties than private individuals, and therefore citizen's arrest statute does not apply to such officers); *United States v. Hillsman,* 522 F.2d 454, 461 (7th Cir.1975) (discussing the differences between a private citizen's right to make an arrest and that of a police officer). These distinct obligations and powers must also be reflected in a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house.

The officers also ask this court to adopt the "consent-once-removed" doctrine based on policy considerations. They argue that without this doctrine law enforcement will be severely hampered in its pursuit of drug traffickers because the use of informants is vital, and requiring officers to obtain a warrant whenever an informant was in a home would jeopardize personal safety and cause delays. This argument fails for two reasons. First, this contradicts the nature of the exceptions based on exigent circumstances requiring that the police may not manipulate or abuse the circumstances creating the exigency. *Zogmaister,* 90 Fed.Appx. at 330 (citing *Aquino,* 836 F.2d at 1272). Second, as recently restated by the Supreme Court in *Georgia v. Randolph,* "[a] generalized interest in expedient law enforcement cannot,

without more, justify a warrantless search." 547 U.S. 103, 126 S.Ct. 1515, 1524 n. 5, 164 L.Ed.2d 208 (2006); *Coolidge,* 403 U.S. at 481, 91 S.Ct. 2022 ("The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.")

Thus, while our case law would support a holding that the Fourth Amendment allows an undercover officer to summon backup officers within a home after that officer has been invited with consent, neither the case law nor a rational extension of the case law would support including officers summoned by an informant within a home. Based on this, we hold that entering Mr. Callahan's home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances, the task force officers violated Mr. Callahan's constitutional rights under the Fourth Amendment.

II. Mr. Callahan's rights were clearly established

Having established that Mr. Callahan's rights were violated, we now turn to whether these rights were clearly established. For a right to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Cortez,* 478 F.3d at 1114-15 (citing *Medina v. City of Denver,* 960 F.2d 1493, 1498 (10th Cir.1992)). This does not require a plaintiff to cite a case holding that

the specific conduct at issue is unlawful, but rather plaintiff must show that the unlawfulness of the action was apparent. *Jones v. Hunt,* 410 F.3d 1221, 1229 (10th Cir.2005).

In this case, the relevant right is the right to be free in one's home from unreasonable searches and arrests. The Supreme Court has repeatedly emphasized the importance of this right, stating "[o]ver and again this Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes . . . and that searches conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (citations omitted). Thirty years after *Katz,* but before the raid on Mr. Callahan's home, the Supreme Court again emphasized the long history of this right. *Wilson v. Layne,* 526 U.S. 603, 610-11, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) ("[T]he 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic' meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest.") (citations omitted). Although the Supreme Court decided *Groh v. Ramirez* after the present events occurred, the Court's analysis in rejecting another exception to the warrant requirement is appropriate, stating "[n]o reasonable officer could claim to be unaware of the basic rule,

well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. . . . Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." 540 U.S. 551, 564, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

This Circuit has also long adopted the view that warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions. *See e.g., Franz v. Lytle,* 997 F.2d 784, 787 (10th Cir.1993) (referring to this limitation as a "cardinal principle" of the Fourth Amendment). Although the officers might argue that their entry fell within the "consent" exception to the warrant requirement, Tenth Circuit law provides that a mere transient guest, without a "substantial interest in or common authority over the property," cannot consent to the entry of others. *United States v. Falcon,* 766 F.2d 1469, 1474 (10th Cir.1985).

The district court held that the right was not clearly established because other circuits have approved of the "consent-once-removed" doctrine. From the district court's perspective, this gave the officers a "reasonable argument" that their actions were justified until this Circuit or the Supreme Court rejected the "consent-once-removed" doctrine. This approach

misreads a plaintiff's burden in showing that a right is clearly established. While case law from other circuits is relevant in the analysis, it relates to whether "the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains." *Cortez,* 478 F.3d at 1114-15. Here, the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances. The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear. Moreover, at the time of these events only the Seventh Circuit had applied the "consent-once-removed" doctrine to a civilian informant. *See United States v. Paul,* 808 F.2d 645, 648 (7th Cir.1986). The precedent of one circuit cannot rebut that the "clearly established weight of authority" is as the Tenth Circuit and the Supreme Court have addressed it.

Here, the officers knew (1) they had no warrant; (2) Mr. Callahan had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them. They do not argue on appeal that exigent circumstances justified their entry. Thus, "reasonable officers could [not] have believed that" their warrantless entry into Mr. Callahan's home "was lawful, in light of clearly established law and the information the officers possessed." *Wilson,* 526 U.S. at 615, 119 S.Ct. 1692 (utilizing this phrasing in defining the "appropriate

level of specificity" for a qualified immunity analysis). Although other circuits might disagree, Tenth Circuit law governed the reasonableness of the officers' beliefs in this case. The officers are not protected by qualified immunity.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

PAUL KELLY, JR., Circuit Judge, dissenting.

Afton Callahan was arrested by the Central Utah Narcotics Task Force (the "Task Force") for distribution and possession of methamphetamine following a warrantless entry into his residence. The warrantless entry occurred after a confidential informant consensually entered Mr. Callahan's residence, purchased methamphetamine using funds provided by the Task Force, and gave what appeared to the officers to be a pre-arranged signal indicating that the drug deal had come to fruition. After successfully challenging the legality of the warrantless entry in Utah courts, *see State v. Callahan*, 93 P.3d 103 (Utah Ct.App.2004), Mr. Callahan brought a civil rights action under 42 U.S.C. § 1983 against individual members of the Task Force, the Task Force itself, and several counties in Utah (collectively "Defendants").

On summary judgment, the district court granted Defendants qualified immunity. Today, the court reverses, holding that (1) the "consent once removed" doctrine does not justify officers' warrantless entry into a residence, at least where the individual gaining initial, consensual entry is a confidential informant,

and (2) the law was clearly established that law enforcement may not enter a residence without a warrant in order to assist a confidential informant – present in the home consensually and possessing probable cause – in effectuating an arrest. Because these holdings unnecessarily part company with at least two (and arguably three) of our sister circuits and are contrary to longstanding Fourth Amendment and qualified immunity principles, I respectfully dissent.

In order to overcome a qualified immunity defense, a plaintiff asserting a cause of action under § 1983 must demonstrate that (1) the defendant's actions violated a federal constitutional or statutory right, and (2) the right alleged to have been violated was clearly established at the time of the conduct at issue.[1] *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

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[1] Despite heated debate among the Justices on the matter, the Supreme Court has explained that the lower federal courts are obliged to consider the qualified immunity questions in turn and may not skip the first step – whether a constitutional or statutory right was violated – simply because the case can be disposed of on the second. *See Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. The district court below clearly violated this command when it assumed a constitutional violation and nonetheless held in Defendants' favor on the second *Saucier* step. Disregarding the district court's failure, the majority faithfully fulfills its obligation "to set forth principles which will become the basis for a holding that a right is clearly established," *id.*; unfortunately, it arrives at an erroneous conclusion.

At the highest level of abstraction, the right at issue is the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. The Supreme Court has interpreted the Fourth Amendment to require government agents to obtain a warrant before entering a residence for purposes of search or arrest. *See Welsh v. Wisconsin,* 466 U.S. 740, 748, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). The warrant requirement, however, is nowhere near absolute; there are exceptions, though they are "few in number and carefully delineated." *United States v. United States Dist. Court,* 407 U.S. 297, 318, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). "[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent" freely and voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). This exception results from the recognition that the primary purpose of the Fourth Amendment – "protection of the privacy of the individual, his right to be let alone," *Davis v. United States,* 328 U.S. 582, 587, 66 S.Ct. 1256, 90 L.Ed. 1453 (1946) – is forfeited when a homeowner freely allows government agents inside.

Thus, it is abundantly clear that had one or more members of the Task Force gained consent to enter Mr. Callahan's home, there would be no Fourth Amendment violation. *See United States v. Cruz-Mendez,* 467 F.3d 1260, 1265-66 (10th Cir.2006). As

the court notes, the same would be true had the Task Force members gained consent under the guise of being plain-clothed citizens looking to purchase methamphetamine. *See Lewis v. United States,* 385 U.S. 206, 211, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). Analogously, the confidential informant's consensual entry was not a violation of the Fourth Amendment, despite the fact that Mr. Callahan had no idea he was acting as a government agent at the time. *See United States v. Lowe,* 999 F.2d 448, 450-51 (10th Cir.1993).

What was unclear in this circuit, at least until today, was whether Mr. Callahan's consent to the confidential informant coupled with the subsequent drug transaction so eroded his legitimate expectation of privacy that officers could enter his residence without a warrant in order to effectuate his arrest. The court answers that question in the negative, invalidating the consent once removed doctrine where confidential informants, rather than full-fledged officers, are involved. I, however, would draw the line elsewhere.

Under the doctrine of consent once removed, law enforcement officials may enter a residence without a warrant if the following conditions are met:

> The undercover agent or informant: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers.

United States v. Pollard, 215 F.3d 643, 648 (6th Cir.2000) (quoting *United States v. Akinsanya,* 53 F.3d 852, 856 (7th Cir.1995)). The name "consent once removed" is somewhat of a misnomer, however, because the doctrine depends on more than consent alone. *See United States v. Yoon,* 398 F.3d 802, 809-10 (6th Cir.2005) (concurring op.). Rather, the doctrine requires both a valid consensual entry – which alleviates the warrant requirement – and a concomitant destruction of the homeowner's legitimate expectation of privacy – which allows officers to enter. *Id.*; *see also United States v. Paul,* 808 F.2d 645, 648 (7th Cir.1986) ("[T]he interest in the privacy of the home . . . has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him."). When one gives consent for another individual to enter his home in order to buy or sell narcotics, he not only assumes the risk that the person is an undercover government agent, but also that the individual will later testify to his observations, that he will attempt to effectuate an arrest on-the-spot, or that he will take some of the contraband and hand it over to the police. *Paul,* 808 F.2d at 648. Given the assumption of these risks, the marginal risk that an individual will instead invite law enforcement officials to assist in an on-the-spot arrest "is too slight to bring the requirement of obtaining a

warrant into play."[2] *Id.*; *see also United States v. Rubio,* 727 F.2d 786, 797 (9th Cir.1983).

The crucial question, then, is whether a homeowner's legitimate expectation of privacy is any greater when he allows a confidential informant into his home rather than a full-fledged officer. The court answers that question with a resounding "yes," but I fail to see the difference in the two situations. The court draws the line at police officers because "the person with authority to consent never consented to the entry of police into the house" when only a confidential informant is admitted and "the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state." Ct. Op. at 897.

While it is technically correct that Mr. Callahan never consented to the entry of police, no one ever consents to the entry of police in these undercover situations; they instead consent to the entry of someone who *might* be the police (an undercover officer), or as in this case, someone who *might* be a government agent (a confidential informant). So long as an

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[2] The court misconceives the conceptual underpinnings of the consent once removed doctrine, suggesting the doctrine is premised upon the existence of two consents – one from the homeowner to the confidential informant and one from the confidential informant to the police. Viewed in that light, however, the doctrine could not operate as to either confidential informants or police officers. Police officers have just as little authority to subsequently admit other officers into a home as confidential informants do.

invitation to enter is extended to a government agent (even unknowingly), the pertinent issue is not the type of government agent allowed in, but the consequence of that invitation, combined with the subsequent sale of narcotics, on a resident's reasonable expectation of privacy. And the only principled resolution of that issue is to hold that, no matter what type of government agent is allowed in, any previously existent legitimate expectation of privacy is abandoned.

I am similarly unconvinced by the court's reliance on the distinction between those powers possessed by police officers and those possessed by other citizens. The confidential informant in this case was doubtless a government agent for Fourth Amendment purposes. "In deciding whether a private person has become an . . . agent of the government, two important inquiries are: 1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *Pleasant v. Lovell,* 876 F.2d 787, 797 (10th Cir.1989). In this case – as is the same in nearly all cases involving undercover stings utilizing confidential informants – law enforcement knew of the confidential informant's intrusive actions beforehand, and those actions were undertaken with the purpose of assisting the police.

There is also no denying that citizens (including confidential informants) in Utah, and nearly every other state, possess the power to arrest another

individual who commits a felony in their presence. *See* Utah Code Ann. § 77-7-3 (2003). To be sure, the ordinary citizen does not possess *all* the powers and obligations attendant to being a police officer. But once that citizen becomes a government agent and embarks on a joint venture with the police, as the confidential informant in this case did, both he and the officers for whom he works face civil liability for any of his actions later deemed unconstitutional. *See Pleasant,* 876 F.2d at 798-99. Police have no greater obligation than to respect citizens' constitutional rights, but that obligation carries over to the confidential informant once he agrees to work closely with the government and is imbued with state action. This fact distinguishes confidential informants from other citizens and, combined with the citizens' arrest power, renders application of the consent once removed doctrine to them abundantly reasonable.

Finally, the line the court draws creates odd results. Although police officers themselves may enter a residence to assist a fellow officer in effectuating an arrest, other government agents – such as agents of the Internal Revenue Service – might not have the same capacity. I fear future cases will turn on how closely the "powers and obligations" of the government agent in question resemble those of the classic police officer, rather than on Fourth Amendment

reasonableness, *see Illinois v. Rodriguez*, 497 U.S. 177, 183-85, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).[3]

Because I see no principled distinction between police officers and other government agents, including confidential informants, in regard to a resident's legitimate expectation of privacy following consensual entry, I would join the Sixth and Seventh Circuits in clearly extending the consent once removed doctrine to confidential informants. Thus, I would hold that no constitutional violation occurred in this case and that qualified immunity was properly granted.

Although the extension of the consent once removed doctrine to confidential informants is an issue on which reasonable minds might differ, there is no doubt that the right at issue was not clearly established at the time the Task Force acted. "[T]he affirmative defense of qualified immunity . . . protects

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[3] Despite the district court's suggestion to the contrary, the Supreme Court's recent decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), does not affect the viability of the consent once removed doctrine. In that case, the Court held that police may not reasonably enter premises under dual control when one occupant is physically present and refuses admittance. *Id.* at 1519. Beyond the fact that *Randolph* may have slightly altered the circumstances under which a confidential informant or undercover officer may enter and remain in a residence under the first prong of the consent once removed doctrine, it is inapposite because it does not address whether, once valid consent is granted to a government agent and probable cause of criminal activity is established, a search is rendered unreasonable if additional officers enter a residence to help effectuate an arrest.

all but the plainly incompetent or those who knowingly violate the law." *Medina v. Cram,* 252 F.3d 1124, 1127 (10th Cir.2001) (internal quotation marks omitted). To be clearly established, the contours of a right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Moreover, the clearly established law inquiry is an objective one, *see Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), and "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151. A right is "clearly established" if Supreme Court or Tenth Circuit case law exists on point or if the "clearly established weight of authority from other circuits" found a constitutional violation from similar actions. *Murrell v. Sch. Dist. No. 1,* 186 F.3d 1238, 1251 (10th Cir.1999).

Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause. As the district court observed, no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right. The court is no more successful in identifying such a decision. Instead, it relies upon cases holding that a warrantless

search of a home is per se unreasonable unless officers gain consent or exigent circumstances exist.[4] *See* Ct. Op. at 897-99 (citing *Katz, Wilson, Groh, Franz,* and *Falcon*). The court's approach is flawed, however, because it characterizes the right in overly broad terms and begs the question – what is the effect on a resident's legitimate expectation of privacy where the consent exception to the warrant requirement applies? Because neither the Supreme Court nor the Tenth Circuit has previously addressed this issue in the context of a warrantless entry of officers where a confidential informant is involved, we must look to other circuits for guidance.

Prior to the events giving rise to this litigation, three circuits had issued opinions which could have led a reasonable officer to believe that a warrantless entry was legal in this case. First, the Seventh Circuit, in 1986, clearly held that the consent once removed doctrine applies equally where confidential informants are involved, relying on a reduced expectation of privacy. *See Paul,* 808 F.2d at 648. Second, the Sixth Circuit, in 2000, applied the consent once removed doctrine in a situation in which both an officer and a confidential informant were granted consent to enter and "*the informant* accompanying

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[4] *United States v. Falcon,* 766 F.2d 1469 (10th Cir.1985), relied upon by the court, discusses what is required for one to possess the power to grant consent, not the consequences of a proper grant of consent on a homeowner's legitimate expectation of privacy. *See id.* at 1474.

the officer immediately summoned the other officers for assistance." *Pollard,* 215 F.3d at 648-49 (emphasis added). Importantly, the Sixth Circuit stated that the consent once removed doctrine applies where "[t]he undercover agent *or informant* "consensually enters a residence, establishes probable cause, and immediately summons help. *See id.* at 648 (emphasis added). Finally, the Ninth Circuit, in 1996, explained that the consent once removed doctrine applies where "undercover agent[s]" are involved, *see United States v. Bramble,* 103 F.3d 1475, 1478 (9th Cir.1996); and a reasonable officer could have believed the term "undercover agent[s]" includes confidential informants acting as government agents.

In sum, because neither the Supreme Court nor the Tenth Circuit has heretofore addressed the propriety of the consent once removed doctrine as applied to confidential informants, and the clear weight of authority from other circuits strongly suggested that the Task Force's actions in this case were legal, I would hold that the right at issue was not clearly established and would affirm the grant of qualified immunity.

2006 WL 1409130

United States District Court,
D. Utah,Central Division.

Afton Dale CALLAHAN, Plaintiff,

v.

MILLARD COUNTY; The Central Utah Narcotics Task Force; Sevier County; Sanpete County; Piute County; Mt. Pleasant City; Wayne County; Richfield City; Salina City; Gunnison City; Ephraim City; Cordell Pearson in his official and individual capacity; Marty Gleave, in his official and individual capacity; Clark Thomas, in his official and individual capacity; Dwight Jenkins, in his official and individual capacity; and John Doe I-IX in their official and individual capacities, Defendants.

No. 2:04-CV-00952.

May 18, 2006.

James K. Slavens, Fillmore, UT, for Plaintiff.

Peter Stirba, Harold H. Armstrong, Meb W. Anderson, Stirba & Associates, Gary R. Guelker, Jenson Stavros & Guelker, Salt Lake City, UT, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PAUL G. CASSELL, District Judge.

This is a § 1983 action in which plaintiff Afton Callahan alleges the named defendants violated his Fourth Amendment rights by a warrantless entry into his home. Both sides have moved for summary judgment. The court finds it possible that the entry into the home was justified under the consent-once-removed doctrine, as a confidential information [sic] who had been given access to the home had authority to invite law enforcement officers into the home as well. Because this legal doctrine possibly justified the officers' actions, they did not violate clearly-established Fourth Amendment rights. Accordingly, they are entitled to qualified immunity. The legal entities who supervised the law enforcement officers are also entitled to judgment in their favors. Accordingly, the court GRANTS the defendants' motion for summary judgment [# 61] with respect to Mr. Callahan's federal claims and dismisses his state claims without prejudice. The court DENIES Mr. Callahan's motion for partial summary judgment [# 52].

BACKGROUND

For the purposes of these competing motions for summary judgment, the court finds the following facts. The Central Utah Narcotics Task Force is charged with investigating illegal drug use and sales in Central Utah. The Task Force regularly relies on confidential informants to achieve its goal of eradicating the sale and use of illicit drugs. Brian Bartholomew

agreed to assist the Task Force as one of those confidential informants after being charged with possession of methamphetamine. On March 19, 2002, Mr. Bartholomew encountered plaintiff Afton Callahan at a gas station in Fillmore where the two had a casual conversation. Mr. Bartholomew then contacted Officer Jeffrey Whatcott of the Task Force and informed him that Mr. Callahan would have methamphetamine to sell later that day. Officer Whatcott instructed him to call back later if he had any more information, and Mr. Bartholomew promised to do so. Mr. Bartholomew left work around 5:00 p.m. without further talking to Mr. Callahan or any subsequent discussions with Officer Whatcott.

Mr. Bartholomew then proceeded to buy some beer and drink between six to eight beers in three hours. Around 8:00 p.m., he visited Mr. Callahan's home, determining that methamphetamine was in fact available. Mr. Bartholomew also ingested or tasted a sample of the methamphetamine. He then made further arrangements to make a purchase that night at Mr. Callahan's house. Mr. Bartholomew left the house under the auspices of procuring funds and contacted Officer Whatcott. He reported that he set up a deal between him and Mr. Callahan, and the Task Force arranged to meet further with Mr. Bartholomew.

At 9:00 p.m., Mr. Bartholomew met with members of the Task Force and briefed them on his conversations with Mr. Callahan. He indicated that he could likely purchase a gram of methamphetamine

for $100 from Mr. Callahan at his house. The Task Force members also discovered that Mr. Bartholomew had been drinking heavily. Officer Whatcott consequently monitored Mr. Bartholomew for several hours, urging him to drink numerous cups of coffee until the Task Force could ensure his competency to complete the job. Mr. Bartholomew did not inform the Task Force, however, of his indiscretions with methamphetamine during his visit to Mr. Callahan's house. Once the Task Force determined Mr. Bartholomew's readiness for the task, they searched him for drugs and equipped him with a wire and a transmitter. They also gave him a marked $100 bill, and xeroxed that bill as well. The Task Force then discussed the procedures of the arranged buy with Mr. Bartholomew, indicating that he should proceed with the buy at 11:00 p.m. The Task Force determined that Mr. Bartholomew would give the Task Force officers a pre-determined signal once he completed the buy. This signal "was to act like he was going to play the drums that were on the porch of the residence."[1]

The Task Force then transported Mr. Bartholomew to Mr. Callahan's trailer and he gained entrance to the house through the attached porch door after being let in by Mr. Callahan's daughter. The house entrance included an enclosed wooden porch attached to the front of Mr. Callahan's house. The porch had a separate door to the outside, and contained items

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[1] *State v. Callahan*, Jury Trial Transcript I, at 72 (Aug. 5, 2002).

such as a drum set, washer and dryer, a garbage bag, and shelves. There was also a two-inch crack between the floor of the porch and the interior door of the trailer house. Once Mr. Bartholomew entered the house, the Task Force monitored the conversation through the wire on his person.

Once inside, Mr. Bartholomew asked Mr. Callahan for some methamphetamine, and they completed the deal. Mr. Callahan removed a large baggie from his kitchen freezer, unrolled it, and provided a number of smaller baggies of methamphetamine for Mr. Bartholomew to purchase. They then exchanged the marked $100 bill for one bag of methamphetamine. Mr. Bartholomew then left the house and entered the porch area together with Mr. Callahan and a third person. As the three men entered the porch area, Mr. Bartholomew "mentioned that [all three of them] should play the drums."[2] The reference to the drums (even though Mr. Bartholomew did not actually play the drums) signaled to the Task Force that the deal had been completed. "When [Officer Whatcott] heard [Mr. Bartholomew] say something about playing on the drums . . . [saying something about how Mr. Bartholomew] wanted to play drums on the porch . . . is when [Officer Whatcott] advised the other officers the [methamphetamine] deal had been made."[3] While the Task Force defendants concede lack of clarity of

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[2] *State v. Callahan*, Jury Trial Transcript II, at 19-21 (Aug. 6, 2002).

[3] Jury Trial Transcript I, at 81.

some of the transmissions over the wire, Officer Whatcott testified that he recognized the prearranged signal. He then signaled the other Task Force members that the deal had been completed and gave the "okay" to enter the trailer house.

The Task Force officers entered through the porch door and ordered Mr. Bartholomew and another individual to lay on the ground. Mr. Callahan observed the police from inside the house portion, just outside of the porch enclosure, and proceeded to step outside onto the porch at that moment. Additionally, at that moment, the other person with Mr. Bartholomew reached for one of the officer's flashlight that happened to be attached to the end of the officer's weapon. Officers from the Task Force observed Mr. Callahan drop a plastic bag into the porch area which they later confirmed contained methamphetamine. The Task Force officers ordered Mr. Callahan to the ground as well, and also ordered a fourth person to the ground when he opened the interior door and stepped onto the porch enclosure. After overcoming resistance to the order, two officers then placed that fourth person on the ground.

Several Task Force officers then conducted a protective sweep of the house trailer looking for any other suspects in the vicinity. The Task Force conducted this sweep "to see if there were any other subjects, make sure that no one was in there with weapons, [so the Task Force officers] couldn't get

hurt."[4] The four suspects were brought into the house trailer and read their *Miranda* warnings, but had not yet been arrested. According to three Task Force officers and the Utah Court of Appeals, Mr. Callahan then consented to a search of the trailer. A search of Mr. Bartholomew's person led to a baggie of methamphetamine in his pocket. The Task Force also found in Mr. Callahan's possession the marked $100 bill issued to Mr. Bartholomew for the methamphetamine purchase. The Task Force subsequently found drug syringes in Mr. Callahan's house as well.

The Task Force members did not obtain a search or arrest warrant prior to entering Mr. Callahan's enclosed porch or house. The Task Force argues that no warrants were required because of the rapidly unfolding situation, the time of night, Mr. Callahan's parole status, and the exigent circumstances surrounding the drug transaction. One of the Task Force officers testified that the legal basis for entering the house was "to secure the persons in the residence . . . [and because] we knew that there was a large quantity of methamphetamine, and we can secure that residence with those people, and either obtain a search warrant from that point or from permission to search."[5] Because Mr. Bartholomew had "seen so much methamphetamine, [the Task Force officer in charge, Commander Cordell Pearson] didn't want any

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[4] Jury Trial Transcript II, at 82.

[5] Jury Trial Transcript II, at 101.

of it to walk out of there or any of it disposed of prior to [the Task Force] getting into the house after [Mr. Bartholomew] had been there."[6] And the Task Force officers note that they knew that persons selling drugs in smaller, more rural counties generally disposed of those drugs to their buyers in a quick manner, almost never more than 4-5 hours from the time they first secured the drugs. The defendants argue that the Task Force reasonably believed that obtaining a search warrant in the short time between the arranged buy and when Mr. Bartholomew first confirmed the availability of drugs would not be timely to ensure the continued existence of the methamphetamine at Mr. Callahan's house.

After the arrest and search, the State of Utah charged Mr. Callahan with possession and distribution of methamphetamine. Mr. Callahan moved to suppress the evidence of methamphetamine and drug paraphernalia. The trial court, however, found that exigent circumstances existed warranting the warrantless search. Mr. Callahan then entered into a conditional plea of guilty reserving the right to appeal his unfruitful motion to suppress.

The Utah Court of Appeals reversed the trial court's decision on the motion to suppress in *State v. Callahan*[7] and reversed Mr. Callahan's conviction. On appeal, the Utah Attorney General's Office conceded

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[6] *Id.* at 103.

[7] 93 P.3d 103 (Ut.Ct.App.2004).

that no exigent circumstances existed to justify the warrantless search. Rather, the Utah Attorney General's Office argued an alternative theory that the Task Force officers "inevitably would have discovered the evidence found in [Mr. Bartholomew's] pocket based on their routine and standard police practices."[8] Citing *State v. Topanotes*,[9] the Attorney General's Office contended that even if the Task Force had not illegally entered and searched Mr. Callahan's home, Mr. Bartholomew "would have left the home and presented the Task Force with the methamphetamine."[10]

The Utah Court of Appeals held that under the circumstances described it was "not possible to conclude that the evidence would have been discovered through independent, legal avenues."[11] It therefore concluded that "the evidence from [Mr. Bartholomew's] pocket [was] not admissible pursuant to the inevitable discovery doctrine."[12] Because of the Attorney General's Office's concession, the Court of Appeals also held that the trial court "erred in justifying the Task Force officers' warrantless entry into [Mr.] Callahan's home under the doctrine of exigent circumstances."[13] It stated that the "Task Force's adoption of

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[8] *Id.* at 106.

[9] 76 P.3d 1159 (Utah 2003).

[10] *Callahan*, 93 P.3d at 107.

[11] *Id.* (quotations omitted).

[12] *Id.*

[13] *Id.*

tactics that involve planned illegal entry should not be countenanced, and permitting the use of any evidence found during this situation would provide no deterrent at all to future unlawful detentions, entries, or searches."[14]

Mr. Callahan now brings his claims through a 42 U.S.C. § 1983 action in this court, arguing that the Utah Court of Appeals' decision is the "law of the case." Because the Utah Court of Appeals found the Task Force violated Mr. Callahan's Fourth Amendment rights, he argues he is entitled to judgment in his favor. He also seeks remedies for the Task Force's violations of his right to privacy under the Fourteenth Amendment and his "right to personal security as guaranteed by the United States Constitution and protected under 42 U.S.C. § 1983."[15] He further argues that the alleged violations of his constitutional rights resulted from the municipal entities' policies or customs and their failure to supervise the Task Force members. Finally, Mr. Callahan brings various state law claims, including wrongful arrest, assault and battery, defamation, intentional infliction of emotional distress, and mislabels "punitive damages" as a cause of action. Mr. Callahan seeks partial summary judgment on the Task Force defendants' liability as a matter of law [# 51].

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[14] *Id.* (quotations omitted).

[15] Amended Complaint, at ¶¶ 57-61.

The Task Force defendants respond by contending they are entitled to summary judgment on Mr. Callahan's claims. The Task Force defendants argue that (1) the consent-once-removed doctrine justified the Task Force's warrantless search; (2) Mr. Callahan's parole status gave the Task Force the ability to conduct a warrantless search based solely on reasonable suspicion of criminal activity; (3) Mr. Callahan did not have a reasonable expectation of privacy on his enclosed porch; and (4) exigent circumstances were present, along with probable cause of criminal activity to permit a valid warrantless search. They also argue that even if the court finds their conduct constitutionally deficient, the Task Force defendants are entitled to qualified immunity. And the Task Force defendants seek summary judgment on Mr. Callahan's state law claims, including wrongful arrest, battery, assault, and intentional infliction of emotional distress, through immunity provided by the Utah Governmental Immunity Act.[16]

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to

[16] UTAH CODE ANN. §§ 63-30-1 *et seq.*

judgment as a matter of law."[17] The court must view the evidence, and draw reasonable inferences from that evidence, in the light most favorable to the nonmoving party.[18] The nonmoving party may not, however, "rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing there is a genuine issue for trial."[19] "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient [to overcome summary judgment]; there must be evidence on which the jury could reasonably find for [the nonmoving party]."[20]

DISCUSSION

Turning first to Mr. Callahan's motion, it is clear that the "law of the case" doctrine does not preclude this court from examining the issues despite the Utah Court of Appeals' decision. Mr. Callahan's overarching argument primarily consists of the assertion that because the Utah Court of Appeals reversed his conviction and held the search of his residence unconstitutional,[21] his § 1983 suit must prevail. According

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[17] Fed.R.Civ.P. Rule 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Cummings v. Norton*, 393 F.3d 1186, 1189 (10th Cir.2005).

[18] *Cummings*, 393 F.3d at 1189; *Spaulding v. United States*, 279 F.3d 901, 904 (10th Cir.2002).

[19] *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986).

[20] *Id.* at 252.

[21] *Callahan*, 93 P.3d 103.

to the Tenth Circuit, "[t]he law of the case doctrine obligates every court to honor the decisions of courts higher in the judicial hierarchy."[22] Given that the respected Utah Court of Appeals is an appellate *state* court, it is not "higher in the judicial hierarchy" for this federal court. Accordingly, the Court of Appeals' decision does not constitute "law of the case."

At the same time, however, it would be foolish to ignore the Utah Court of Appeals' decision if it considered the same issues between the same parties. In this vein, the Supreme Court in *Migra v. Warren City School District Board of Education* noted that "issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered."[23] Under 28 U.S.C. § 1738, it is true that state court judgments "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the court of such State . . . from which they are taken." "This statute has long been understood to encompass the doctrines of res judicata, or "claim preclusion," and collateral estoppel, or "issue

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[22] *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1543 (10th Cir.1996) (citing *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir.1991)).

[23] 465 U.S. 75, 83 (1984).

preclusion."[24] The Supreme Court succinctly defines these two terms:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.[25]

"A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit *between the same parties or their privies.*' "[26] As the Supreme Court noted in *Montana v. United States,* to "preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility

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[24] *San Remo Hotel, L.P. v. City & County of San Francisco,* 545 U.S. 323, 332 (2005).

[25] *Id.* at 332 n. 16 (quotations omitted).

[26] *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)) (emphasis added).

of inconsistent decisions."[27] Preclusion of non-parties to the previous litigation might "fall[] under the rubric of collateral estoppel" as long as "interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issue previously resolved."[28] But collateral estoppel is specifically reserved for the "persons for whose benefit and at whose direction a cause of action is litigated" who "cannot be said to be strangers to the cause."[29]

Although Mr. Callahan was a party in *State v. Callahan*, the defendant officers and entity defendants were not. Rather, the State of Utah pursued that case. Mr. Callahan has not alleged, nor could he reasonably allege, that the Task Force or entity defendants were persons for whose benefit and at whose direction the previous cause of action was litigated. Indeed, through their counsel here, the individual officers vigorously assert arguments that the Utah Attorney General's Office chose not to pursue. Because the current defendants were not parties or privies to the previous litigation, collateral estoppel principles cannot apply to the case before this court. The court will, of course, look to the Utah

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[27] *Montana*, 440 U.S. at 153-54.

[28] *Id.*

[29] *Id.* (quotations omitted).

Court of Appeals' decision for persuasive guidance. But that decision lacks preclusive weight in this case.

Turning then to Mr. Callahan's alleged Fourth Amendment violation, the Task Force and municipal defendants argue that no Fourth Amendment constitutional violations occurred, and that if they occurred, they are entitled to qualified immunity. The court notes that "even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard."[30] After the U.S. Supreme Court's holding in *Brosseau v. Hagen*,[31] the court must first ask on a qualified immunity issue whether the facts show the Task Force officers' conduct violated a constitutional right.[32] If the court concludes that a constitutional violation did occur, then the court must undertake an inquiry "in the light of the specific context of the case, not as a broad general proposition" as to whether the right was clearly established.[33] Under this clearly-established prong, the Task Force officers are immune unless "the

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[30] *Davis v. Scherer*, 468 U.S. 183, 190 (1984); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[T]he qualified immunity defense ... provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

[31] 543 U.S. 194 (2004).

[32] *Id.* at 197 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *Simkins v. Bruce*, 406 F.3d 1239, 1241 (2005).

[33] *Saucier*, 533 U.S. at 201.

law clearly proscribed the actions" taken.[34] For this court, in "making this determination, the relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[35] Now that the Task Force defendants have raised the defense of qualified immunity, the burden shifts to Mr. Callahan to show that (a) the Task Force defendants violated a constitutional right, and, (b) that the right was clearly established at the time of the Task Force defendant's conduct.[36]

A. The Court Will Assume Mr. Callahan Has Established a Violation of His Constitutional Rights.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[37] Mr. Callahan argues that the Utah Court of Appeals reversed his conviction and established that the Task Force defendants violated his Fourth Amendment rights. As noted above, this decision by the Utah Court of Appeals is not the "law of the case" doctrine, nor do collateral estoppel principles apply. Accordingly, the court must consider the

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[34] *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *see also Meyers v. Redwood City*, 400 F.3d 765, 770 (9th Cir.2005).

[35] *Saucier*, 533 U.S. at 202.

[36] *Batiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir.1998).

[37] U.S. CONST., amend. IV.

arguments by the Task Force and entity defendants, who argue that (1) the doctrine of "consent-once-removed" entitled the Task Force to enter Mr. Callahan's residence; (2) Mr. Callahan was a parolee and therefore his home could be searched to establish evidence of a parole violation; (3) Mr. Callahan possessed no Fourth Amendment rights on his screen porch; and (4) exigent circumstances existed to justify the Task Force defendants' warrantless entry.

The defendants' strongest argument appears to be the doctrine of "consent-once-removed." Under this doctrine, if an undercover agent or informant is given consent to enter a home, in certain circumstances that consent to enter without a warrant can be extended to other law enforcement officers who can provide assistance to that agent or informant.[38] The consent given to the first person, generally a law enforcement officer but sometimes an informant, is then transferred to the entering police officers once the first person requests assistance from the police based on probable cause. As described by the Sixth Circuit in *United States v. Pollard*, police officers that have been called to assist a person already in a house may perform a warrantless entry and search if an

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[38] *See* WALTER R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1(c) at 290 & n. 114 (4th ed. 2004) ("[I]t has frequently been held that no warrant is needed where the arrest is made within premises to which an undercover police officer gained admittance by indicating his interest in participating therein in criminal activity.").

"undercover agent or informant (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search and (3) immediately summoned help from other officers."[39] Therefore, the "consent-once-removed" doctrine applies to the warrantless entry and search by police that are summoned at the behest of the undercover agent or informant.

Besides the Sixth Circuit, the Seventh and Ninth Circuits have embraced this doctrine.[40] The Seventh Circuit applied the doctrine of "consent-once-removed" to a case in which a government informant received consent to enter an apartment, viewed heroin in the apartment and "immediately summoned the agents, who entered the apartment just as [the informant] was leaving."[41] That circuit held in *United States v. Akinsanya* that "when [the suspect] gave consent to [the informant] to enter his apartment, he effectively gave consent to the agent with whom [the informant] was working. . . . That consent was not withdrawn simply because [the informant] stepped out of the apartment moments before, or at the same

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[39] *Pollard*, 215 F.3d 643, 648 (6th Cir.2000).

[40] *See id.* at 643; *United States v. Bramble*, 103 F.3d 1475 (9th Cir.1996); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir.1995); *United States v. Diaz*, 814 F.2d 454 (7th Cir.1987); *United States v. Paul*, 808 F.2d 645 (7th Cir.1986).

[41] *Akinsanya*, 53 F.3d at 856; *see also United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir.1994); *Paul*, 808 F.2d at 648.

time, the agents entered."[42] Since at least 1986, the Seventh Circuit has applied the "consent once removed" doctrine to "a confidential informant wearing . . . an alert button."[43] And the Ninth Circuit in *United States v. Bramble* "join[ed] the Seventh Circuit in holding that where an undercover agent is invited into a home, established the existence of probable cause to arrest or search, and immediately summons help from other officers, the warrantless entry of the other officers does not violate the Fourth Amendment."[44] The Tenth Circuit has not, however, spoken on the issue.

The Sixth Circuit adopted the broadened reasoning of the Seventh Circuit recently in *United States v. Yoon*.[45] In that case, the circuit applied the "consent-once-removed" doctrine to "cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest."[46] In that case, a confidential informant engaged in monitored conversations with Mr. Yoon, finally agreeing to purchase 20 pounds of marijuana at Mr. Yoon's apartment.[47] Upon invitation into the apartment, Mr.

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[42] *Akinsanya*, 53 F.3d at 856.

[43] *Jachimko*, 19 F.3d at 299 (citing *Paul*, 808 F.2d at 648).

[44] 103 F.3d 1475, 1478 (9th Cir.1996) (citing *Akinsanya*, 53 F.3d at 856 and *Jachimko*, 19 F.3d at 298-99).

[45] 398 F.3d 802, 807 (6th Cir.2005)

[46] *Id.* at 808.

[47] *Id.* at 807.

Yocn and the informant viewed the marijuana, and the informant then gave a prearranged signal over his radio transmitter to the police officers waiting outside.[48] The Sixth Circuit held that Mr. Yoon possessed the authority to invite the informant into his residence, also holding that viewing the marijuana "established the necessary probable cause to effectuate an arrest."[49] The analysis partly rested on the fact that the transaction took place in Tennessee, and that Tennessee is one of the states that grants citizens actual arrest powers.[50] According to the Sixth Circuit, the warrantless search did not violate Mr. Yoon's constitutional rights because the civilian informant "could have made the arrest himself had he chosen to do so. Instead, he called officers to assist him, a permissible choice."[51] As noted above, the Seventh Circuit has reached similar conclusions.[52]

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Pollard*, 215 F.3d 643, 648.

[52] *See Akinsanya*, 53 F.3d 852; *Jachimko*, 19 F.3d 296; *Paul*, 808 F.2d 645; *see also United States v. Diaz*, 814 F.2d 454, 459 (7th Cir.1987), *cert. denied*, 484 U.S. 857 (1987) (limiting the use of this doctrine to instances in which "the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the probable cause to effectuate an arrest or search, and immediately summoned help from other officers.").

The case before this court is essentially identical to *Yoon*,[53] *Akinsanya*,[54] *United States v. Jachimko*,[55] *and United States v. Paul*.[56] Mr. Callahan invited the confidential informant, Mr. Bartholomew, into his home to purchase methamphetamine. Mr. Bartholomew, wired by the Task Force officers, entered the home and purchased drugs. When Mr. Bartholomew viewed and purchased the methamphetamine, the requisite probable cause for an arrest by the Task Force was established. And, like the Tennessee state law discussed in *Yoon*, Utah law "recognizes the right of a private person to make a citizen's arrest in narrowly defined circumstances."[57]

Mr. Callahan responds that *Yoon* was decided in 2005, while the search in this case occurred in 2002. But it is clear that the Seventh Circuit's cases in *Akinsanya*, *Jachimko* and *Paul* were all decided prior to 1996, over eight years before the actions took place in this case. More important, however, this argument misses the main point: if *Yoon*, *Akinsanya*, *Jachimko* and *Paul* were correctly decided, then no Fourth Amendment violation ever took place here.

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[53] 398 F.3d 802.

[54] 53 F.3d at 856.

[55] 19 F.3d at 299.

[56] 808 F.2d at 648.

[57] *State v. Quada*, 918 P.2d 883, 886-887 (Utah Ct.App.1996) (citing Utah Code Ann. § 77-7-3).

Mr. Callahan also makes the more fundamental argument, however, that *Yoon* and its predecessors are simply incorrect. He also notes that the Tenth Circuit has not explicitly or implicitly adopted this doctrine.

The court, too, wonders about the grounding of this doctrine. It seems a bit of a stretch to call the kind of police entry that occurred here "consensual." To be sure, Mr. Callahan invited one person – Mr. Bartholomew – into his home. But he did not give Mr. Bartholomew any authority to invite others into his home. The Supreme Court's very recent decision in *Georgia v. Randolph*[58] suggests that the Supreme Court may not be receptive to the doctrine. *Randolph* held that police could not enter a home over Mr. Randolph's objections even though his wife simultaneously gave consent to enter. The Court explained that "[t]his case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of the fellow occupant."[59] Thus, if confronted with a case squarely presenting the "consent-once-removed" doctrine, the Supreme Court might well conclude that the objections of an occupant might trump the further warrantless police entry that occurs from an undercover operative

[58] 126 S.Ct. 1515 (2006).

[59] *Id.* at 1528.

or confidential informant originally receiving consent to enter from that occupant.

This is just a prediction about the future, however. Today, the "consent-once-removed" doctrine has been upheld and applied in the Sixth, Seventh, and Ninth Circuits. It has been explicitly applied not only to undercover police agents, but also to government and confidential informants in the Sixth and Seventh Circuits. Ultimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment. For purposes of resolving this case, the simplest approach is to assume that the Supreme Court will ultimately reject the doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment.

B. Any Violation By Individual Officers Was Not of Clearly-Established Rights.

Even proceeding on the basis of an assumed violation of constitutional rights, however, the court finds that the individual defendants are all entitled to qualified immunity. Mr. Callahan still bears the burden to demonstrate the "clearly established nature" of any constitutional right that is violated.[60] "A right is 'clearly established' if Supreme Court or Tenth Circuit case law exists on point or if the 'clearly

[60] *Baptiste v. J.C. Penny Co.*, 147 F.3d 1252, 1255 (10th Cir.1998).

established weight of authority from other circuits' found a constitutional violation from similar actions." [61]In *Saucier v. Katz,* the Supreme Court stressed that "[t]his inquiry must be undertaken in light of the case's specific context, not as a broad general proposition."[62]

The Tenth Circuit in *Holland v. Harrington* extended this inquiry by explaining that an officer is entitled to qualified immunity because of a reasonable police officer's mistake.[63] In evaluating such a reasonableness standard, the circuit stated that "[a] mistake of law may be 'reasonable' where the circumstances 'disclose substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did.'"[64] Therefore, this court must look to fundamentally similar case law, but it may also examine the reasonableness of the officer's mistake, to determine the "clearly established" nature of the alleged constitutional violations.

Mr. Callahan counters that he has pointed out clearly established law that (1) warrantless searches

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[61] *Murrell v. School Dist. No. 1,* 186 F.3d 1238, 1251 (10th Cir.1999).

[62] *Saucier,* 533 U.S. at 201.

[63] *Holland ex rel. Overdorff v. Harrington,* 268 F.3d 1179, 1196 (10th Cir.2001).

[64] *Id.* (quoting *Saucier v. Katz,* 533 U.S. at 208).

of a person's home are presumptively unreasonable,[65] (2) there is a heavy burden if entry into a home is involved,[66] (3) that police officers cannot create their own exigent circumstances,[67] and (4) that the State must establish both probable cause and exigent circumstances.[68] At a general level, this is all true. But on the specifics of this case, the officers had a reasonable argument that the "consent-once-removed" doctrine justified their actions. Indeed, it is clear that in Sixth, Seventh and Ninth Circuits their actions would have been fully consistent with the Constitution. Put another way, unless and until the Tenth Circuit or the Supreme Court rejects the "consent-once-removed" doctrine, a police officer in Utah

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[65] *See Roska v. Peterson*, 328 F.3d 1230, 1240 (10th Cir.2001) ("It is well-established that a warrantless search is presumptively unreasonable under the Fourth Amendment. . . .").

[66] *See Anderson v. Creighton*, 483 U.S. 635, 668 n. 24 (1987) ("It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (quotations omitted).

[67] *See United States v. Mikulski*, 317 F.3d 1228, 1233 (10th Cir.2003) (counseling against the "manufacture of exigencies"); *United States v. Acquino*, 836 F.2d 1268, 1272 (10th Cir.1988) ("[W]ell-meaning officers may exploit such opportunities without sufficient regard for the privacy interests of the individuals involved.").

[68] *See Cortez v. McCauley*, 438 F.3d 980, 993 (10th Cir.2006); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1171-72 (10th Cir.2003) ("It is a basic principle of Fourth Amendment law that searches and seizures inside the home without a warrant are presumptively unreasonable unless the police can show both probable cause and the presence of exigent circumstances.").

relying on the doctrine (in a case where the doctrine factually applies) has not violated a clearly established right.[69]

Finally, it is also worth noting that the Utah trial court and the Utah Court of Appeals differed on the legality of the search in this case. The trial court considered all the facts and circumstances of the case and concluded that the officers faced sufficient exigent circumstances to justify warrantless entry into the home. The trial court cited the presence of a very dangerous drug – methamphetamine – and the possibility of quick disposal of the drugs as creating exigent circumstances. To be sure, the Utah Court of Appeals differed with the trial court after the Utah Attorney General's Office declined to defend that position. Without agreeing with the final legal conclusion of the trial court,[70] it certainly provides considerable evidence that the actions of the officers in this case were not in violation of clearly-established rights.

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[69] In light of this conclusion, the court need not reach the arguments raised by the defendants as to the justifications for their actions.

[70] *Cf. Brigham City v. Stuart,* 126 S.Ct 979 (2006), *granting certiorari to review Brigham City v. Stuart,* 122 P.3d 506 (Utah 2005) (finding no exigent circumstances to justify warrantless entry).

C. The Entity Defendants Are Entitled to Summary Judgment.

Mr. Callahan's suit against the entity defendants relies on claims that these defendants implemented unconstitutional official polices or customs as the catalyst to Mr. Callahan's injuries. Additionally, Mr. Callahan claims that the entity defendants failed to properly train the Task Force defendants, thereby causing his constitutional injuries.

The court recognizes no respondeat superior liability under § 1983 for municipal entities.[71] To survive summary judgment, Mr. Callahan must show that the entity took its municipal action "with the requisite degree of culpability and must demonstrate a causal link between that action and the deprivation of federal rights."[72] In order to impose supervisor liability under § 1983, it is not enough for [Mr. Callahan] merely to show [the entity defendants were] in charge of other state actors who actually committed the violation. Rather, [Mr. Callahan] must establish a deliberate, intentional act by the supervisor to violate constitutional rights. [Mr. Callahan] may satisfy this standard by showing the defendant-supervisor personally

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[71] *See Cannon v. City and County of Denver*, 998 F.2d 867, 877 (10th Cir.1993); *see also Monell v. Dep't of Social Servs.*, 436 U.S. 658, 680 (1978).

[72] *Bd of County Commr's v. Brown*, 520 U.S. 397, 404 (1997).

directed the violation or had actual knowledge of the violation and acquiesced in its continuance."[73]

> Mr. Callahan has failed to point to any official policy or custom implemented, or not implemented, by the entity defendants which led to the violation of Mr. Callahan's rights. Mr. Callahan has also pointed to no arguable facts in the record which demonstrate the entity defendants' failure to train. In fact, the entity defendants demonstrate that each of the Task Force defendants have been properly certified to perform police work in the state, and also demonstrate that the entity defendants held bi-annual meetings to discuss the supervision of the Task Force. Therefore, Mr. Callahan's § 1983 claims against the municipal entities for their implementation of policies or customs, or their lack of policies or customs, fails. And, particularly given the recognition of the "consent-once-removed" doctrine in several circuits, the court cannot find any municipal entity liability either under Mr. Callahan's failure to supervise and train § 1983 claims. Accordingly, the court finds this claim ripe for summary judgment as well.

D. Mr. Callahan's State Law Claims

Having granted summary judgment to the Task Force and entity defendants on Mr. Callahan's federal

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[73] *Beedle v. Wilson*, 422 F.3d 1059, 1074 (10th Cir.2005).

claims, the court declines to exercise supplemental jurisdiction on any of Mr. Callahan's state law claims. Although both sides make arguments regarding the Utah Governmental Immunity Act and its application to this case, the court declines to consider these arguments, as they are best resolved in Utah courts. Accordingly, the court dismisses these claims without prejudice.

CONCLUSION

Given the foregoing discussion, the court GRANTS the defendants' motion for summary judgment [# 61] and DENIES Mr. Callahan's motion for partial summary judgment [# 52]. The federal law claims are dismissed with prejudice. The state law claims are dismissed without prejudice. The Clerk's Office is directed to close this case.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AFTON CALLAHAN, Plaintiff-Appellant, v. MILLARD COUNTY, et al., Defendants-Appellees.	No. 06-4135

ORDER

Filed September 6, 2007

Before **KELLY**, and **EBEL**, Circuit Judges and **MURGUIA**,* District Judge.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no

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* The Honorable Carlos Murguia, District Judge, United States District Court for the District of Kansas, sitting by designation.

judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

OPPOSITION BRIEF

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(2)

No. 07-751

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE, DWIGHT JENKINS, CLARK THOMAS, AND JEFFREY WHATCOTT,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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February 2008

QUESTION PRESENTED

1. Whether police officers may enter a home without a warrant on the theory that the owner consented to the entry by consenting to the entry of a confidential informant.

2. Whether the Fourth Amendment's prohibition of warrantless entry into a home is clearly established, such that officers who violate that right are not entitled to qualified immunity.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-30, is reported at 494 F.3d 891. The district court's order, Pet. App. 30-59, is unreported.

STATEMENT

On March 19, 2002, Petitioners, members of the Central Utah Narcotics Task Force, engaged a confidential informant in a plan to raid Respondent's home on suspicion of dealing methamphetamine. Pet. App. 2. The informant agreed to help the Task Force after being charged with possession of methamphetamine. *Id.* Before meeting with Petitioners, the informant drank "between six to eight beers in three hours," and "ingested or tasted" methamphetamine. *Id.* Petitioners learned that the informant "had been drinking heavily" and was intoxicated, *id.* at 33, and were "concerned about his competency." *Id.* at 3. Petitioners nevertheless proceeded with the plan after giving the informant coffee. *Id.* Petitioners "wired the confidential informant, gave him a marked $100 bill, and worked out a signal for him to give the officers" after completing a purchase of methamphetamine. *Id.* The informant went to Respondent's home, and once inside gave "a variation" of the agreed-upon signal. *Id.* The informant did not indicate that he or anyone was in danger, nor did he indicate that drugs were about to be destroyed. *See id.*

Petitioners then entered Respondent's home without a warrant, ordered Respondent and other individuals to the floor, and conducted a protective sweep of the home. *Id.* at 3-4. As a result of the search of Respondent and his home, Petitioners

found evidence of a drug sale and possession. *Id.* at 4.

Based on the evidence discovered as a result of the warrantless entry and search of Respondent's home, Respondent was charged with possession and distribution of methamphetamine. *Id.* Respondent objected to the introduction of that evidence, but the trial court found that exigent circumstance justified the warrantless entry. *Id.* On appeal, the Utah Court of Appeals reversed, holding (in accordance with the Utah Attorney General's concession) that there were no exigent circumstances, and rejecting the state's "inevitable discovery" argument. *Id.*

Respondent then brought a suit for damages under 42 U.S.C. § 1983, alleging that Petitioners' warrantless entry and search of his home violated his rights under the Fourth and Fourteenth Amendments. *Id.* at 4-5. On cross-motions for summary judgment, the district court commented that "[i]t seems a bit of a stretch to call the kind of police entry that occurred here 'consensual.'" Pet. App. 52. The court did not decide whether the search violated the Fourth Amendment; instead, it assumed that Petitioners violated Respondent's constitutional rights. *Id.* The court held Petitioners were entitled to qualified immunity because Respondent's rights were not clearly established.

The Tenth Circuit reversed. Pet. App. 1-18. The court of appeals held that Petitioners violated Respondent's clearly established rights under the Fourth Amendment. *Id.* at 8-18. The court noted that "[c]ourts continually have viewed the warrantless entry into a house as presumptively unreasonable" because "'the home is entitled to the

greatest Fourth Amendment protection.'" *Id.* at 8, quoting *United States* v. *Najar*, 451 F.3d 710, 712-13 (10th Cir. 2006).

The court of appeals held that this presumption of unreasonableness can be overcome only when the search falls within one of a few "carefully defined" exceptions based on the presence of exigent circumstances. Pet. App. 9, quoting *United States* v. *Walker*, 474 F.3d 1249, 1252 (10th Cir. 2007). Petitioners did not advance a theory of exigent circumstances, but instead asked the court to approve an extension of the so-called "consent-once-removed" doctrine. *Id.* at 10.

Some courts have held that the Fourth Amendment does not forbid officers from entering a residence without a warrant to assist an undercover officer who has been admitted to the home "at the express invitation of someone with authority to consent." *Id.* at 11. The Tenth Circuit held that "no extension" of its law "would be necessary" to approve such a search. "[T]he consent granted to the hypothetical undercover officer would have covered additional backup officers without any need for additional exceptions to the warrant requirement." *Id.* at 12.

In contrast, the court held, a finding that an invited *civilian* informant has the authority to summon a police officer to enter the home without a warrant "would require an expansion of the consent exception" because "the person with authority to consent never consented to the entry of police into the house." *Id.* The court of appeals rejected Petitioners' argument that the power of citizens to effect a "citizen's arrest" could justify extending

consent from an undercover informant to police. *Id.* at 12-13. The court also rejected Petitioners' policy argument that requiring a warrant would "jeopardize personal safety" of officers and "cause delays." *Id.* at 13. The court found these arguments contrary to the nature of exigent circumstances exceptions, which forbid police from manipulation of the circumstances creating the exigency. *Id.* The court also held that Petitioners' expediency argument would be contrary to this Court's recent holding that "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Id.* at 13-14, quoting *Georgia* v. *Randolph*, 547 U.S. 103 (2006). Accordingly, the court held that by "entering Mr. Callahan's home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances, [Petitioners] violated Mr. Callahan's constitutional rights under the Fourth Amendment." *Id.* at 14.

The court of appeals held that Respondent's constitutional right to be free from warrantless search and arrest in his home was clearly established. *Id.* at 14-15. The court quoted this Court's decision in *Groh* v. *Ramirez* that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Id.* at 15-16, quoting *Groh*, 540 U.S. 551, 564 (2004). Officers who seek "to craft a new exception" to "that fundamental tenet" "cannot reasonably have relied on an expectation that [the Court] would do so." *Id.* at 16, quoting *Groh*, 540 at 564. The court also held

that under Tenth Circuit precedent, "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id.* at 16. The officers could not come within the consent exception because under the court's cases, "a mere transient guest, without a 'substantial interest in or common authority over the property,' cannot consent to the entry of others." *Id.*, quoting *United States* v. *Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985).

REASONS FOR DENYING THE PETITION

Petitioners contend that a new exception to the constitutional warrant requirement should be established for circumstances in which a confidential informant is allowed to enter a home and subsequently summons police after viewing evidence that would establish probable cause to make an arrest. The court of appeals' decision declining to craft the requested exception is correct. The court applied this Court's and its own long standing precedents that when police enter a home without a warrant, the entry is presumptively unreasonable unless it falls within one of a few carefully defined exceptions. The right to be free from such an entry is clearly established, and is no less so simply because Petitioners argue that a new exception should be added to the list. No further review is warranted in this case.

While the Tenth Circuit declined to hold, as two other circuits have, that the so-called "consent once removed" doctrine justifies a warrantless entry in these circumstances, the other circuits' decisions do not warrant the Court's review here. This is not a criminal case directly addressing the question of whether the evidence seized under these

circumstances should be suppressed. The legality of the search was decided in the state courts: it was held to be illegal.

This is a Section 1983 case seeking damages for that illegal search. The only issue presented here is whether Petitioners were entitled to qualified immunity. The constitutional right to be free of warrantless entry by police into one's home was firmly and clearly entrenched at the time Petitioners made their warrantless entry. Petitioners seek to establish a new exception to that right based upon the "consent-once-removed" theory. Petitioners improperly attempt to rely on authority from the sole circuit (outside the Tenth Circuit) that had found such an exception at the time of their warrantless entry as a basis for entering Respondent's home without a warrant or exigent circumstances.

In the time *since* the warrantless entry in this case, only two additional courts of appeals have addressed the consent-once-removed theory as applied to non-police confidential informants.

Petitioners' second asserted "division in authority" (Pet. 14-19) on the sources of law that a court of appeals considers to determine whether rights are clearly established, does not warrant this Court's review either. The difference among the courts of appeals on this question is slight and makes no difference in this case because Petitioners would not have prevailed under any of the asserted standards.

1. The asserted circuit split does not merit this Court's review. Only three circuits have addressed whether the doctrine of "consent once

removed" allows a confidential informant's signal to justify a warrantless entry into a private home.

Petitioners attempt to portray the theory as far more developed than it is by listing courts that have recognized the doctrine "in some form," and providing a lengthy string of citations to cases purportedly discussing the "consent once removed" theory. *See* Pet. 7 n.2, 12-13. An examination of those cases, however, shows that almost none of them contribute to the asserted division of authority. To begin with, Petitioners' citation to courts that have adopted "some form" of the consent-once-removed theory includes cases that involved only a police officer's call for assistance, *not* a confidential informants'; Petitioners' lengthy string cite, Pet. 12-13, includes similar cases.[1] While Petitioners cite a total of 15 decisions from the three circuits that *have* addressed the issue (including district court decisions) many of those cases involved police officers, not confidential informants. *Id.* at 12-13. The rest of the cited cases use the term "consent once removed," but not to refer to either an officer's or an informant's signal for assistance. Those cases involve a variety of tangential issues, such as whether an undercover officer who was allowed to enter a private residence may leave and then reenter without a warrant (sometimes with backup) to effect

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[1] *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Wisconsin* v. *Johnston*, 518 N.W.2d 759 (Wis. 1994); *New Jersey* v. *Henry*, 627 A.2d 125 (N.J. 1993); *United States* v. *Samet*, 794 F. Supp. 178 (E.D. Va. 1992).

the arrest,[2] whether entry is justified when an informant leaves the residence and provides evidence to officers,[3] or even more remote factual situations.[4]

In sum, while many cases have discussed the admissibility of evidence under the Fourth Amendment using the words, "consent once removed," only three courts of appeals have addressed the issue here: the propriety of a warrantless entry into a private home on the signal of a confidential informant. Review of that issue in this case should be denied to allow the issue to develop further in the courts of appeals.

2. The petition does not merit this Court's review because this case arose on the denial of qualified immunity. The state court here held that the Petitioner' warrantless entry into Respondent's home was illegal and that decision is no longer subject to review. Pet. App. 4. The decisions of the state court and the court of appeals were based on the well grounded Fourth Amendment principle that

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[2] *New Jersey* v. *Penalber*, 898 A.2d 538 (N.J. Super. Ct. App. Div. 2006); *Ohio* v. *Heriot*, No. CA 2004-06-071, 2005 WL 1131731 (Ohio Ct. App. May 16, 2005); *Williams* v. *Texas*, 937 S.W.2d 23 (Tex. App. 1996); *Commonwealth* v. *Moye*, 586 A.2d 406 (Pa. Super. Ct. 1990); *People* v. *Cespedes*, 191 Cal. App. 3d 768 (Cal. App. 1987).

[3] *Illinois* v. *Finley*, 687 N.E.2d 1154 (Ill. App. Ct. 1997); *see also Illinois* v. *Galdine*, 571 N.E.2d 182 (Ill. App. Ct. 1991) (entry into office).

[4] *See Smith* v. *Maryland*, 857 A.2d 1224 (Md. Ct. Spec. App. 2004) (defendant arrested on sidewalk; officers entered residence with key to search for evidence); *Brown* v. *United States*, 932 A.2d 521, 527 n.8 (D.C. 2007) (noting in footnote that neither party had raised consent once removed).

protects individuals from warrantless entry into their private residence.

To be entitled to qualified immunity, Petitioners must establish an exception to that right. Such exceptions are "'jealously and carefully drawn'" by this Court. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones* v. *United States*, 357 U.S. 493, 499 (1958)). The exception that Petitioners seek here had, at the time of their warrantless entry into Respondent's home, been approved by only one court of appeals. Pet. 16. Neither this Court nor the Tenth Circuit had addressed the question, much less approved of it. The question of whether it would have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001), therefore, depends on whether Petitioners could have reasonably believed in good faith that the Tenth Circuit or this Court would adopt a new exception based on the consent-once-removed theory as applied to confidential informants.

This Court has already held that officers *cannot* rely on the expectation that the Court would craft such a new exception. In *Groh* v. *Ramirez*, the Court considered an officer's argument that he was entitled to qualified immunity for a search conducted pursuant to facially invalid warrant because the search met the Constitution's particularity requirement for other reasons. 540 U.S. at 560. The Court stated that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Id.* at 564. The Court noted that

the officer sought a "new exception" to that principle. The court held: "Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." *Id.* at 565. The same is true here. When Petitioners entered Respondent's home, no case from this Court (or from the Tenth Circuit, any state's highest court, or from any other circuit save one) had ever approved a warrantless entry based on the signal of a confidential informant. Petitioners could not reasonably rely on the expectation that the courts would establish such an exception.

Petitioners attempt to circumvent *Groh* by positing that the "right" that must be clearly established for purposes of qualified immunity is limited to the precise circumstances of this case, *i.e.*, "the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause." Pet. 16 (quoting Pet. App. 27 (Kelly, J., dissenting). But this Court has held that courts need not have previously found the particular practice at issue to be unlawful in order to find that it violated clearly established law. *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.").

Petitioners' assertion that police might be unwilling to engage in drug buys using confidential informants if certiorari is denied (Pet. 13) is unwarranted. Police have ample tools (including anticipatory warrants) to effectively conduct

investigations using confidential informants without effecting warrantless entries into suspects' homes. *See United States* v. *Grubbs*, 547 U.S. 90, 95 (2006) (holding that anticipatory warrants are constitutional). In addition, police would still be authorized to enter, even without a warrant, if exigent circumstances were present.

3. The court of appeals was correct to hold that the Fourth Amendment does not permit police to enter a home without a warrant when a confidential informant has signaled the existence of probable cause.

The search at issue in this case involves "physical entry of the home," which this Court has described as "the chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980). "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001).

The Court has approved only very few, well-defined exceptions, for exigent circumstances or consent, to the presumption that warrantless entry into a home is unconstitutional. *See, e.g.*, *Minnesota* v. *Olson*, 495 U.S. 91, 100 (1990) (the "correct standard" is that "warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the

dwelling." (citation omitted)); *Steagald* v. *United States*, 451 U.S. 204, 214 n.7 (1981) ("[A]bsent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant.").

As the Utah Attorney General conceded, this case did not present any exigent circumstances. Pet. App. 4. There was no danger to the informant or anyone else in Respondent's home, nor was there any indication that evidence was about to be destroyed. While the informant viewed evidence sufficient to establish probable cause, and communicated that to Petitioners, probable cause alone does *not* justify a warrantless entry to effect an arrest. *Payton*, 445 U.S. at 602-03. The text of the Fourth Amendment makes clear that both probable cause *and* a warrant on oath or affirmation are required. U.S. Const. amend. IV. *See also Coolidge* v. *N.H.*, 403 U.S. 443, 480 (1971) ("If we were to agree . . . that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, . . . then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution."). Petitioners could easily have obtained a warrant here.

As the court of appeals held, the fact that police were summoned by a confidential informant rather than a fellow officer makes an important difference. *See* Pet. App. 11. A police officer who witnesses a felony being committed in his presence may arrest an individual without a warrant, even in the suspect's home, if the officer was legally in the home because he was admitted by consent. *See id.* at

12. That arresting officer may immediately face the practical problem of taking control of the crime scene, which he may be unable to do without the assistance of other officers. For example, a single undercover officer may be outnumbered by the others present, he may not know whether or how many other people are present but unseen, he may be unarmed, or the suspects may resist. These circumstances could justify calling for the assistance of other officers. Those officers may not need a warrant because the suspect has already consented to the presence of a police officer; to require separate consent or a warrant for the assisting officers could hamper the original officer's ability to effectively perform a lawful police function.

Even if an undercover officer's call for assistance could present circumstances that would vitiate the need for a warrant, the same cannot be said of a confidential informant. While citizens may have a theoretical right to effect a "citizen's arrest" in certain states, there was no allegation that the informant here (or in any case cited by Petitioners) intended to do so. In addition, as the Tenth Circuit held, "[t]hat a citizen has the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state." Pet. App. 12 (collecting cases). And there is little reason to believe that when undercover informants cooperate with police they would be likely to attempt the arrest themselves. Accordingly, the host of problems that could create an exigency that justifies a police officer summoning backup do not apply to a confidential informant.

Nor does "consent" justify this entry. While consent is an exception to the Fourth Amendment's prohibition on warrantless entry to a person's home, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990), the consent exception is "'jealously and carefully drawn.'" *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones* v. *United States*, 357 U.S. 493, 499 (1958)). Respondent's consent to the entry of the informant did not constitute consent to the entry of police. To be sure, any individual takes the risk that someone he admits to his home may be a police officer or an undercover informant, but it is the *police* that the Fourth Amendment requires to obtain a warrant or consent before entering. The statement of a civilian that sees contraband after wandering in to a residence through an open door may be the basis of a warrant to search that residence even though his entry was illegal, but the same would not be true of a police officer who entered a residence without authority. *Compare, e.g., Walter* v. *United States*, 447 U.S. 649, 656 (1980) ("It has, of course, been settled since *Burdeau* v. *McDowell*, 256 U.S. 465 [(1921)], that wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully.") *with, e.g., Soldal* v. *Cook County*, 506 U.S. 56, 66 n.10 (1992) ("[I]f the police officers' presence in the home itself entailed a violation of the Fourth Amendment, no amount of probable cause to believe that an item in plain view constitutes incriminating evidence will justify its seizure."). Accordingly, allowing an individual who *is not* a police officer to enter one's home is not consent to a warrantless entry by

individuals who *are* police officers. At a minimum, consent to the entry of police must involve consent to the entry an individual who is a police officer.

4. The asserted "three way disagreement in the lower courts" on the sources of clearly established law does not merit this Court's review. Pet. 14. Petitioners argue that the courts of appeals apply three different approaches to this question, but the asserted differences are inconsequential, and Petitioners would not have prevailed on any of the approaches articulated in the petition.

Petitioners do not even argue that there is a circuit split on the proper sources of "clearly established law." The only difference between the three asserted approaches appears to be whether, when there is no decision on point from this Court or the court of appeals deciding the case, the court of appeals chooses to look to state law or out-of-circuit federal law. Pet. 18-20. Petitioners argue that some courts look outside their own circuit to determine whether the law is clearly established, while the Second and Eleventh Circuits do not. *Id.* The only asserted difference between those two courts is that the Eleventh would consider authority from the highest court in the state where the activity occurred, while the Second would look only to federal law. *Id.* at 19-20.

These relatively minor variations may have little impact on the decision of actual cases, and in any event are consistent with basic principles of what authority is binding and persuasive to federal courts. Petitioners have not cited any case in which the decision to consider (or not) out-of-circuit or state authority made a difference to any court's decision

that the law was or was not clearly established. *See* Pet. 20-21. Furthermore, it is fundamental that the federal courts of appeals are bound only by this Court's decisions and their own prior decisions (and not even the latter when sitting en banc). The courts of appeals may look to other circuits, lower courts, and state courts as persuasive authority, but are free to disagree with how the question before them has been answered by those courts. In this regard, the question of what constitutes clearly established law is no different from any other question of law. To the extent some courts have said that they will consider a slightly broader range of authority than other courts, their exercise of discretion does not require review by this Court.

This is particularly true here, where Petitioners could not prevail under any of the approaches articulated in the Petition. This case arose in a court that applies the most expansive of the three asserted approaches, considering the "weight of authority from other courts" outside the Tenth Circuit. *Cortez* v. *McCauley*, 478 F.3d 1108, 114-15 (10th Cir. 2007). As Petitioners admit, at the time of the warrantless entry here, only one other circuit had addressed the question of whether a confidential informant may consent to a warrantless police entry. Pet. 16, citing *United States* v. *Paul*, 808 F.2d 645, 648 (7th Cir. 1986). One circuit's approval of an exception to the warrant requirement does not undermine the longstanding right to be free from warrantless police entry into a private residence. Accordingly, the "weight of authority from other courts" did *not* establish that the asserted

exception to the warrant requirement was valid. *Cortez*, 478 F.3d at 114-15.

Petitioners would have fared even worse under the asserted approaches of the Eleventh or Second Circuits. Because those courts do not consider the authority of other circuits, they would not have considered even the one court that had held favorably to Petitioners' position. *See* Pet. 19-20. Notably, Petitioners do not argue either that adopting a different standard would have changed the outcome of this case or that it would have been decided any differently in another court of appeals. *See id.* at 20-21. Accordingly, this case would be a poor vehicle to decide what sources the courts of appeals should consider when determining whether the law is clearly established.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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In The

Supreme Court of the United States

CORDELL PEARSON; MARTY GLEAVE;
DWIGHT JENKINS; CLARK THOMAS;
and JEFFREY WHATCOTT,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondent's arguments do not withstand scrutiny. The Tenth Circuit's decision below creates a clear and acknowledged circuit split and misapplies the law of qualified immunity. A grant of certiorari is needed in this case to settle the scope of the "consent once removed" doctrine and to correct the Tenth Circuit's qualified immunity analysis.

I. Respondent Concedes That A Circuit Split Exists.

Respondent concedes, as he must, that a clear circuit split exists in this case. The Sixth and Seventh Circuits have held that the "consent once removed" doctrine applies when confidential informants permit the search and that such searches are constitutional. In contrast, the Tenth Circuit below held that the doctrine does not apply in those circumstances and that such searches are unconstitutional. *See* Pet. for Cert. at 8-10. The circuit split is clear and unambiguous, and the Brief in Opposition does not question it.

The Respondent asserts two reasons why the Court should not grant certiorari despite the clear circuit split. First, Respondent argues at length that the Tenth Circuit's Fourth Amendment analysis is correct. *See* BIO at 5-8, 10-15. This argument is misplaced because the merits are not yet before the Court. In addition, the Tenth Circuit's view is the minority view among the Courts of Appeals. The alleged correctness of a minority position is not

normally considered a factor counseling against certiorari review.

Second, Respondent asserts that the Court should not resolve the clear circuit split in order to "allow the issue to develop further in the courts of appeals." BIO at 8. This view is unpersuasive for two additional reasons beyond those discussed in the Petition for Certiorari. *See* Pet. for Cert. at 12-13.

First, the present uncertainty over the "consent once removed" doctrine comes at a high cost for law enforcement. The circuit split places the police in a serious bind. Investigators cannot know whether future courts will find the Tenth Circuit's view or the Sixth/Seventh Circuit view more persuasive. If the courts end up accepting the Sixth/Seventh Circuit view, then the evidence will be admitted against the suspect and the officers will not be liable. If the courts end up accepting the Tenth Circuit's view, then the evidence will be rejected and the officers may face personal liability in light of the Tenth Circuit's prior holding that the illegality of the technique was "clearly established." This sort of uncertainty is intolerable. The Nation's police need a simple rule, and only this Court can provide it.

Second, further percolation is unnecessary because this case is not rocket science. The Court often allows issues to percolate in the lower courts to let more minds ponder difficult questions. This makes sense in complex cases: By the time an issue reaches

the Court, many different judges will have illuminated the issues in written opinions. However, additional percolation makes little sense in a dispute such as this. The facts and the law here are uncomplicated. The question presented asks the Court to resolve whether the entry was constitutionally reasonable, and in particular whether it makes a difference that the initial entry was by an informant instead of an undercover officer. *See* Pet. for. Cert at 8-9. This is a straightforward question, and it seems highly unlikely that additional decisions will bring new pearls of wisdom to help answer it. This area of law demands certainty now, not additional percolation in the lower courts.

II. Respondent's Approach to Qualified Immunity Was Rejected By This Court in *Mitchell v. Forsyth*.

As explained in the Petition for Certiorari, the Tenth Circuit's error in applying the qualified immunity standard provides an independent basis for certiorari review. *See* Pet. for Cert. at 14-20. The Tenth Circuit committed an elementary error by construing the relevant right at the most general level possible. This led to a paradoxical result: The entry was deemed to have violated a "clearly established" right even though it appears that no court had previously held that an entry in similar circumstances violates the Fourth Amendment.

Respondent counters with a novel argument about the significance of *Groh v. Ramirez*, 540 U.S. 551 (2004). According to the BIO, qualified immunity is unavailable when the government relied on an exception to the warrant requirement not already recognized by the Supreme Court. *See* BIO at 9-10. Under this reasoning, courts have two choices: Either they must adopt the proposed exception or else they must rule that the search violated "clearly established" rights.

Mitchell v. Forsyth, 472 U.S. 511 (1985), squarely rejects this approach to qualified immunity. In *Mitchell*, then-Attorney General John Mitchell authorized a warrantless wiretap of a radical domestic group on the untested theory that the Fourth Amendment recognized an exception for domestic security wiretapping. Two years later, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Supreme Court rejected Mitchell's theory and held that such monitoring required a warrant. Forsyth then sued Mitchell, and Mitchell argued that his authorization of the monitoring was protected by either absolute or qualified immunity. This Court held that qualified immunity was the appropriate standard, and it then held that Mitchell was entitled to qualified immunity because existing precedents left unclear whether the Court would accept a domestic security exception to the warrant requirement. *See Mitchell*, 472 U.S. at 530-535. The Court explained:

> We do not intend to suggest that an official is always immune from liability or suit for a

> warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. *But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.*

Id. at 535, n.12 (emphasis added). If the "consent once removed" doctrine does not permit the entry in this case, the circumstances of this case become precisely like those of *Mitchell v. Forsyth*. As in *Forsyth*, the Petitioners are entitled to qualified immunity.

Respondent does not cite *Mitchell v. Forsyth*, but appears to read *Groh v. Ramirez* as implicitly overruling it. *See* BIO at 9-10. This interpretation is incorrect. In *Groh*, the police executed a warrant that did not correctly state the property to be seized: The officer who obtained the warrant "entered a description of the place to be searched in the part of the warrant form that called for a description of the property to be seized." *See Groh*, 540 U.S. at 567 (Kennedy, J., dissenting). In defense of a civil action against them, the officers made a clearly unpersuasive claim that the obviously defective warrant was not actually defective. The Court instead adopted the simple proposition that an obviously defective warrant is, well, obviously defective. *See id.* at 563 ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer

could believe that a warrant that plainly did not comply with that requirement was valid.").

Commentators have widely criticized this holding. For example, Professor LaFave describes it as "flat-out wrong." 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.3(f) (4th ed. 2004) (2007 Supp.). But whether *Groh* was persuasive or not, nothing in the opinion suggests that it overruled *Mitchell v. Forsyth*. Indeed, none of the opinions in *Groh* even cite *Mitchell v. Forsyth*.

III. The Utah Court of Appeals Did Not Decide the Legality of the Search.

Several comments in the Brief in Opposition could be construed generously to suggest that the decision of the Utah Court of Appeals in the prior state court action has preclusive effect on the lawfulness of the officers' entry. *See* BIO at 6 ("The legality of the search was decided in the state courts: it was held to be illegal."). To the extent the BIO is read to make this argument, such a position is without merit.

It is blackletter law that a criminal judgment has no collateral estoppel effect in a subsequent federal civil rights claim brought against individual officers. *See* 18A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4458 (2007) ("[A] judgment against a government does not bind its officials in subsequent litigation that asserts a personal liability against the officials."); *see also Novitsky v. City of Aurora*, 491 F.3d 1244, 1252 n.2 (10th Cir. 2007)

(noting that "a court's conclusion during a criminal prosecution that a law enforcement officer's conduct was unconstitutional is not afforded collateral estoppel effect in a subsequent civil case against the officer because there is no privity between the prosecution in the criminal case and the officer."); *Tierney v. Davidson*, 133 F.3d 189, 195 (2d Cir. 1998) (same) (citing cases).

Judge Cassell's opinion for the District Court discusses this issue in depth, Pet. App. 42-45. Judge Cassell's view that the state court opinion has no preclusive effect was plainly correct. Unsurprisingly, the Tenth Circuit decision below did not challenge it. The lawfulness of the Petitioners' entry into Respondent's home is before the federal courts *de novo*, making this case an ideal vehicle for resolving the scope of the "consent once removed" doctrine.

Indeed, the combination of a clear split on the Fourth Amendment issue and the qualified immunity issue makes this case an unusually strong vehicle for certiorari. By granting certiorari on both Questions Presented, the Court can resolve the split and then, if necessary, resolve the immunity question. If the Court holds that there was no Fourth Amendment violation, the erroneous qualified immunity ruling below will be taken off the books. *See, e.g., Scott v. Harris*, 127 S. Ct. 1769 (2007). On the other hand, if the Court finds a Fourth Amendment violation, it can then turn to the qualified immunity question and

therefore address both issues directly. *See generally Saucier v. Katz*, 533 U.S. 194 (2001).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

94

No. 07-751

Supreme Court, U.S.
FILED
JUN 6 - 2008
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In The
Supreme Court of the United States

CORDELL PEARSON; MARTY GLEAVE;
DWIGHT JENKINS; CLARK THOMAS;
and JEFFREY WHATCOTT,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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2. Docket No. 34; ANSWER to Amended Complaint with Jury Demand filed by Cordell Pearson, Dwight Jenkins, Clark Thomas, Jeffrey Whatcott. (Entered: 05/17/2005).

3. Docket No. 37; ANSWER to Amended Complaint with Jury Demand filed by Millard County, Sevier County, Piute County. (Entered: 06/09/2005).

4. Docket No. 40; ANSWER to Amended Complaint with Jury Demand filed by Marty Gleave, Central Utah Narcotics Task Force, The. (Entered: 07/05/2005).

5. Docket No. 52; MOTION for Partial Summary Judgment filed by Plaintiff Afton Callahan. (Entered: 01/05/2006).

6. Docket No. 53; MEMORANDUM in Support re 52 MOTION for Partial Summary Judgment filed by Plaintiff Afton Callahan. (Entered: 01/05/2006).

7. Docket No. 54; AFFIDAVIT of James K. Slavens re 52 MOTION for Partial Summary Judgment filed by Afton Callahan. (Entered: 01/05/2006).

8. Docket No. 61; MOTION for Summary Judgment filed by Defendants Cordell Pearson, Marty

Gleave, Dwight Jenkins, Clark Thomas, Jeffrey Whatcott, Millard County, Central Utah Narcotics Task Force, The, Sevier County, Piute County. (Entered: 02/02/2006).

9. Docket No. 63; MEMORANDUM in Support re 61 MOTION for Summary Judgment filed by Defendants Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, Jeffrey Whatcott, Millard County, Central Utah Narcotics Task Force, The, Sevier County, Piute County. (Attachments: # 1 Exhibit A pages 1-50 # 2 Exhibit A pages 51-117 # 3 Exhibit B-E) (Entered: 02/02/2006).

10. Docket No 64; MEMORANDUM in Opposition re 52 MOTION for Partial Summary Judgment filed by Defendants Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, Jeffrey Whatcott, Millard County, Central Utah Narcotics Task Force, The, Sevier County, Piute County. (Attachments: # 1 Exhibit A pages 1-50 # 2 Exhibit A pages 51-117 # 3 Exhibit B-E) (Entered: 02/02/2006).

11. Docket No. 77; REPLY to Response to Motion re 52 MOTION for Partial Summary Judgment filed by Plaintiff Afton Callahan. (Entered: 04/03/2006).

12. Docket No. 78; MEMORANDUM in Opposition re 61 MOTION for Summary Judgment filed by Plaintiff Afton Callahan. (Entered: 04/03/2006).

13. Docket No. 81; REPLY to Response to Motion re 61 MOTION for Summary Judgment filed

by Defendants Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, Jeffrey Whatcott, Millard County, Central Utah Narcotics Task Force, The, Sevier County, Piute County. (Entered: 04/18/2006).

14. Docket No. 84; Minute Entry for proceedings held before Judge Paul G. Cassell: Motion Hearing held on 5/11/2006 re 52 MOTION for Partial Summary Judgment filed by Afton Callahan, 61 MOTION for Summary Judgment filed by Sevier County, Millard County, Clark Thomas, Central Utah Narcotics Task Force, The, Piute County, Cordell Pearson, Jeffrey Whatcott, Marty Gleave, Dwight Jenkins. After hearing from counsel, the Court took the motions under advisement and struck all the current deadlines. A ruling will be issued shortly. Attorney for Plaintiff: James Slavens, Attorney for Defendant Peter Stirba. (Court Reporter Karen Murakami.) (Entered: 05/12/2006).

15. Docket No. 85; ORDER denying 52 Mr. Callahan's Motion for Partial Summary Judgment, granting 61 defendants' Motion for Summary Judgment. The federal law claims are dismissed with prejudice. The state law claims are dismissed without prejudice. The Clerk's Office is directed to close this case. Signed by Judge Paul G. Cassell on 5/18/06. (Entered: 05/18/2006).

16. Docket No. 86; OBJECTIONS to 85 Order on Motion for Partial Summary Judgment, Order on

Motion for Summary Judgment, filed by Plaintiff Afton Callahan. (Entered: 05/23/2006).

17. Docket No. 87; MOTION to Enter Judgment filed by Plaintiff Afton Callahan. (Entered: 05/23/2006).

18. Docket No. 88; Memorandum in Support re 87 MOTION to Enter Judgment, 86 Objections filed by Plaintiff Afton Callahan. (Entered: 05/23/2006).

19. Docket No. 91; ORDER denying 87 Motion to Enter Judgment. Signed by Judge Paul G. Cassell on 5/25/06. (Entered: 05/25/2006).

20. Docket No. 92; NOTICE OF APPEAL as to 91 Order on Motion for Miscellaneous Relief, 85 Order on Motion for Partial Summary Judgment, Order on Motion for Summary Judgment, filed by Afton Callahan. Appeals to the USCA for the Tenth Circuit. Fee Status: NOT PAID. (Entered: 06/01/2006).

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21. 06/19/2006 – Docket No. 1928754; Docketing statement filed by Afton Callahan. Original and 4 copies. c/s: y.

22. 09/15/2006 – Docket No. 1955797; Appellant's brief filed by Afton Callahan. Original and 7 copies. c/s: y. Served on 9/13/06. Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix Pages: 70.

23. 10/17/2006 – Docket No. 1965598; Appellees' brief filed by Millard County, Central Utah Narc, Sevier County, Piute County, Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, Jeffrey Whatcott. Original and 7 copies. c/s: y. Served on 10/16/06. Oral Argument? y. Appendix filed. Original and 1 appendix copy. Appendix Pages: 265.

24. 11/20/2006 – Docket No. 1976111; Appellant's reply brief filed by Afton Callahan. Original and 7 copies. c/s: y.

25. 03/05/2007 – Docket No. 2006834; Case argued by James K. Slavens for appellant, and by Peter Stirba for appellee; Submitted to Judges Kelly, Ebel, Murguia.

26. 07/16/2007 – Docket No. 2045825; Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part) and Remanded; Written, Signed, Published. Kelly, dissenting; Ebel; Murguia, authoring judge. [06-4135] Parties served by mail on 7/16/07.

27. 07/30/2007 – Docket No. 2049869 & 2049868-1; Petition for rehearing in [sic] banc filed by Appellees Millard County, Central Utah Narc, Sevier County, Piute County, Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas and Jeffrey Whatcott submitted to court.

28. 08/22/2007 – Docket No. 2056596; Appellant's response filed by Afton Callahan to petition for rehearing in [sic] banc and submitted to court. Original and 18 copies. c/s: y.

29. 09/06/2007 – Docket No. 9510692; Order filed by Judges Kelly; Ebel; Murguia denying petition for rehearing en banc filed by Appellees Mr. Marty Gleave, Mr. Jeffrey Whatcott, Cordell Pearson, Sevier County, The Central Utah Narcotics Task Force, Mr. Clark Thomas, Millard County, Mr. Dwight Jenkins and Piute County.

30. 2/10/2007 – Docket No. 9533903; Petition for writ of certiorari filed on Filed Date: 12/04/2007 by Millard County, et al. Supreme Court Case Number: 07-751.

31. 04/01/2008 – Docket No. 9559273; Supreme court order dated 03/24/2008 granting certiorari filed. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Whether the Court's decision in Saucier v. Katz, 533 U.S. 194 (2001) should be overruled?"

IN THE FOURTH JUDICIAL DISTRICT –
MILLARD COURT

MILLARD COUNTY, STATE OF UTAH

==========

STATE OF UTAH,	)	**MOTIONS HEARING**
Plaintiff,	)	
vs.	)	**Case 021700044**
AFTON DALE CALLAHAN,	)	**Appeal 20030128-CA**
Defendant.	)	**Judge Donald J. Eyre**

BE IT REMEMBERED that this matter came on for hearing before the above-named court on **May 23, 2002**.

WHEREUPON, the parties appearing and represented by counsel, the following proceedings were held:

CERTIFIED TRANSCRIPT

(From Electronic Recording)

[2] **APPEARANCES**

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[3] PROCEEDINGS

(May 23, 2002)

THE JUDGE: You may be seated.

Okay. We'll go on the record in the case of State of Utah versus Afton Dale Callahan. The matter is before the Court on various motions filed by the a, defendant.

Counsel, how do you want to address those motions?

ARGUMENT BY MR. ANDERSON

MR. ANDERSON: Well, Your Honor, there's a couple of matters that a, I'd like to a, talk about.

First of all, there are two motions, a motion to suppress evidence and a motion to dismiss. Our position is that neither motion should be before the Court for hearing for the reason that the, they are really just an attempt on the defendant's part to argue about the facts of the case and a, they're, neither one of them is based on any a, case law or statutory law that I know of that would, that would empower the Court to grant a motion to suppress. In other words, it's not based on any violation of any constitutional right, it's not based on any evidentiary a, rule violation, there's no basis for this Court to grant a motion to suppress.

If the Court will look at the motion to suppress what it alleges is that the case, the a, evidence should be [4] suppressed because the allegation on the defendant's part is the confidential informant was intoxicated. That doesn't rise to the level of a motion to suppress. There's nothing about that. That's just arguing about the facts of the case, even if it was true that he was intoxicated and the state prepared to admit that he had been drinking earlier. But that only goes to maybe the weight of the evidence. It doesn't have anything to do with a suppression of evidence.

And so we'd ask the Court to strike the motion to suppress the evidence.

Also the motion to dismiss, the motion entitled Motion to Dismiss is based on a premises that the a, one of the enhancements alleged in the state's information a, did not in fact exist. In other words, one of the enhancements in the charges against the defendant is that he possessed a, a controlled substance in the, in the presence of a child under the age of a, 18. And what the motion to dismiss is doing is trying to attack that alleged fact. And a, that again, we're just arguing about the facts of the case. That . . . Those kind of issues are issues that should be addressed at the trial.

If the Court recalls, the defendant waived his preliminary hearing in this case, And a, really what both of these motions are attempting to do is to go behind that waiver and argue about the facts of the case.

[5] And I simply think that there is a, no basis whatsoever in the law for the Court to go forward with any kind of a hearing or the, require the state to present evidence on the facts a, on these particular points of facts before the Court at this time. There's just no, no basis for it.

THE JUDGE: Okay. Thank you, Mr. Anderson.

Mr. Harmon, aren't, aren't you basically, aren't these issues for the trier of fact to determine?

ARGUMENT BY MR. HARMON

MR. HARMON: In some respects they are, Your Honor. However, I think that the state has a duty and that rises above, is an unusual duty and that is that they have a duty to see that witnesses that they call to testify are reliable witnesses.

In this case our allegation is, is that the confidential informant was not only intoxicated and under the influence of alcohol, but he was under the influence of methamphetamine at the time that he comes to the home to make the a, the buy of the drugs. And consequently we don't have a reliable informant. If they wanted to rely on –

THE JUDGE: Well, he's not, he's not a confidential informant at this, you know, they haven't, haven't relied upon him as the, for the basis of a search warrant. I assume he's going to be, he's going to be made [6] available at trial. And a, and they're not going for rely upon his hearsay statements. He's going, he's going to be called to testify as to what, what actually occurred.

If he was intoxicated a, that would clearly, clearly you'd have the right to bring that out and that would go to the, to the weight given to his testimony by a trier of fact as to his ability to perceive, to remember, and those type of things.

MR. HARMON: Well that's, that's the basis of our motion, Your Honor, is that we think that the state has a duty to produce reliable witnesses,

and they're under an unusual burden in doing that. And if they can't do that and we're relying on someone that's not reliable, then we think that we're entitled to suppress the evidence of the confidential informant.

THE JUDGE: Well, do you have any case law or statutory authority to –

MR. HARMON: No. I just, I think that's the general burden that the state bears.

THE JUDGE: Well, you know, that's the burden that all people who litigate cases bears [sic] and is the, is the ability of their witnesses to testify and to, and to be, perform in such a manner that is going to be believable either by a judge or a jury.

MR. HARMON: Well I think a, we recognize that [7] these may be issues for a jury, Your Honor. But on the other hand, we felt that before we pass that responsibility to a jury that a, maybe the state a, should look at their case. And if they don't have reliable witnesses we hadn't ought to be proceeding.

With regard to the daughter, as I understood the a, allegations they're saying that Mr., the defendant in this case was guilty of a number of things and that a, sale, possession and paraphernalia, and that that happened in the presence of his daughter. The . . .

Reading the reports that were provided by this matter I think that we have a question on that because the officers are saying they sent the confidential

informant to the house, they were there, listened to it, were watching while it went on. And a, when they, after the transaction takes place and while they're in the process of making an arrest then the daughter comes home.

THE JUDGE: That's true.

MR. HARMON: And another report says that she left and then the transaction took place. And then after the transaction had taken place and the officers were there then she came home.

THE JUDGE: Mr. Anderson, what's your proffer? You know, we didn't have a preliminary hearing so I don't know what the evidence is. What is your proffer as to what [8] evidence you will show to establish that particular element enhancement?

MR. ANDERSON: Well, our proffer of the evidence is that the confidential informant had been at the house when the, the young daughter, I think she was 13, maybe 15 years of age, was there when the, the a, methamphetamine was displayed or showed by the defendant.

She also a, told the officers a, at the time the defendant was arrested or shortly thereafter that she had been there at the house, she had seen the defendant and a, the other two codefendants shooting up, so to speak. She told the a, officers where the syringes were in the house, a, and the officers went to that location in the cupboard and found the syringes.

So the evidence before the Court, or the evidence that the state would present at the trial to the trier of fact is that the, the young person had been in the house, was in the presence of the controlled substance and the paraphernalia while it was in the possession and being, actually being distributed by the defendant. So the state's evidence is, is contrary to, to a, or the state's evidence is that she in fact had been there.

Now, it probably is true that when the confidential informant went to the house and made the actual buy, made the actual buy that a, she, she, she left just as the [9] confidential informant, informant arrived.

But I think there's plenty of basis for the a, enhancement that the controlled substance was possessed by the defendant in the presence of a child immediately before the transaction.

THE JUDGE: That's what the evidence, that's what their, you know, that's not necessarily what they can prove but that's what their proffer is, Mr. Harmon.

MR. HARMON: Well, I guess the concern that I have is that I'm limited to what I have in the reports and I don't think that the, I'm concerned about, and so we'll need to have that proffer of proof reduced to writing.

THE JUDGE: Well, it's been stated on the record.

MR. ANDERSON: Well I, I'd say that all of that is in the record or in the, in the reports that

Counsel has, that, you know, my information is from the reports too.

MR. HARMON: I did visit with the daughter on this matter, Your Honor. She advised me she knew nothing about it. And a, with regard to where they're saying that she was there and saw paraphernalia, none of that was ever found on this defendant, it was found on the codefendants.

THE JUDGE: Well, it was in the house that he lived in though, isn't it?

MR. HARMON: That's correct.

[10] **THE JUDGE:** I believe it's the Court's belief that a, you know, those might be clearly bases for argument. But they are, they are really issues a, they're elements of the enhancements a, that both the a, possession and distribution in the presence of a child. And also a, that has to be shown, and if it cannot be shown then a, the jury would a, be instructed that they couldn't, couldn't convict with respect to that particular enhancement.

The same with respect to the a, is . . .

You've also filed a motion with respect to the, what we've commonly referred to as the gang enhancement –

MR. HARMON: Yes.

THE JUDGE: – where it's the conduct is the, involves three or more people. And a, your position on that one is, is that because one of the

individuals has been found incompetent to proceed that a, he's not a person?

MR. HARMON: Were saying that a, that may be a possibility, I think. But the other one is is that we're saying that if the confidential informant were to testify he would say that the other man was asleep at all times during this. He wasn't a party to participate in this in any manner. He wasn't a gang member, he was asleep.

THE JUDGE: Again that's, you know, if, if there wasn't a . . . That's one of the elements of that enhancement that there has to be three people, three or more people [11] involved. If you can't establish that then that's a, that's an issue for the trier of fact.

So it's going to be the a, with respect to those motions to dismiss those enhancements the Court's going to deny those motions a, those are clearly issues that can be raised at the time of trial. And a, and those, those are elements that have to be proven beyond a reasonable doubt and, and will be part of the elements of the, of the, to be a, to have the jury determine whether they have been met.

MR. HARMON: Your Honor, I think we understand that.

There are some things that we would a, like to have from the state on this, particularly with regard to the condition of the confidential informant.

We have the reports. Obviously from what Mr. Anderson said the officers were aware that the

confidential informant was consuming alcohol. And I think that we should ask them to augment their reports to give us a report on all information that they have concerning his use of alcohol on that day.

THE JUDGE: The Court's going to make that order that a, require a, if it's not contained currently within the reports that they disclose any of, any knowledge they have as to any consumption of alcohol by the individual, a, the, any [12] of the witnesses involved, and also any use of controlled substances on that particular day.

MR. HARMON: Okay. Thank you, Your Honor.

THE JUDGE: Do you understand that, Mr. Anderson?

MR. ANDERSON: Well, I do. Do you want us to put on evidence at this point or just make a –

THE JUDGE: No. Just that, I'm just ordering you to a, require the officers that were directing this particular individual, I think it's Mr., Mr. Bartholomew. At least that's what I get from the –

MR. ANDERSON: Yes.

THE JUDGE: – from the reading of the, of the case, any knowledge they have as to a, his physical condition or their, their observations or their knowledge as to what, if any, alcohol or controlled

substances he'd consumed on that, on that particular day.

MR. ANDERSON: We, we . . . I'll have them write a supplemental report and furnish that to Counsel, yes. There's no problem with that.

THE JUDGE: Okay. Anything else, Mr. Harmon?

MR. HARMON: I did have one other matter I thought we should address. The trial on the case is set for July 9th and we anticipate calling the codefendants to testify.

[13] We've been made aware that a, one of the codefendants is currently at the diagnostic unit and at the prison prior to being sentenced. We'd like to have the a, trial date set after he's been sentenced and after we have a determination by the Court as to the competency of the other codefendant.

THE JUDGE: Why would . . . I . . . Why do you want a . . .

What's your reason for that? They can be, you know, if you desire, you know, we, we can transport them.

MR. HARMON: I think that we could. But it just seems to me in the interest of justice and fairness to this defendant he shouldn't have to have a, people testify who we have a question of whether or not they're competent.

And with regard to the other codefendant who's awaiting sentencing, because that may have some influence on . . . If the sentencing is over and a, everything is done then he's going to be in a position where he can testify without any threat from anybody. And we'd like to be able to have that.

THE JUDGE: Mr. Anderson, any response?

MR. ANDERSON: Well, I think either one of them are going to be available to testify. And a, –

THE JUDGE: Well –

MR. ANDERSON: – I just don't see the, the [14] reason for it. Other than, I suppose, if Adam Evans is already sentenced then he's free to say whatever he wants without any consequences as far as sentencing is concerned. I think that's what Counsel is concerned about. I don't think that's a, a legitimate reason to postpone the trial until after he's sentenced. It –

THE JUDGE: Well, it kind of cuts both ways, you know, I'm, maybe I'll send him to prison, maybe he'll be mad anyway.

MR. ANDERSON: Right. So I don't know.

But I'm just saying I don't think that that's a legitimate reason to continue the case. But I don't really object to the case being continued as long as all of the witnesses are, are going to be available on the

new date. We'd like to coordinate that date with them.

THE JUDGE: Well, the problem I have is, is a, I just don't have any dates. That, I do the –

MR. HARMON: Mr. Callahan is incarcerated, Your Honor. He's not going anywhere. And –

THE JUDGE: Well, but it's –

MR. HARMON: – he's not asking for an immediate speedy trial.

THE JUDGE: Well I'll, I'll do this. I'll . . . It doesn't look like I'm going to do . . . Someone has asked that I be recused on a case in Juab County. I . . . This will be [15] after Mr. Evans is sentenced. So let's see, when will it be? What date did we have him come back? Do you recall? It was in August.

THE CLERK: (Short inaudible, no mic).

THE JUDGE: No, it was in July sometime. 8th of July? No. Was it that? Okay. Anyway.

MR. ANDERSON: Adam, Adam Evans. What date, do you remember what date we were we supposed to sentence him?

THE CLERK: Presentence you mean? I don't know if it was the 23rd of June or the 8th of July.

THE JUDGE: I, I think it was in July sometime. So I'm going to set this for August 6th. Is

that . . . Do you think you've got all of your witnesses here? Is everybody going to be available on that date?

MR. ANDERSON: I'm sorry?

THE JUDGE: August 6th?

MR. ANDERSON: That looks like it's okay to us. August the 7th is juvenile court so I guess we'd need to –

THE JUDGE: Well, you . . . Is this going to take two days?

MR. ANDERSON: I think we had it set for two days before.

THE JUDGE: Did we, did we? I think we only had it for the one. Yes. I only, I only have . . . Oh, we had it for two. Okay. Let's do it for the 5th and 6th of [16] August then.

MR. HARMON: That will be fine, Your Honor.

MR. ANDERSON: That's fine.

THE JUDGE: You know, Nicky Evans will be available if you wanted to call him. But, you know, it might be that he'll never determined [sic] to be competent. So that's just a risk you take.

MR. HARMON: Yes. Well, I'd rather take that risk and have the reports and know what we're dealing with, Your Honor.

THE JUDGE: Okay.

MR. ANDERSON: I guess we don't know whether Nick Evans is going to be declared competent or not, so I don't know what kind of –

THE JUDGE: Well I, I, that's why I, that's why I was saying I don't, I don't think that, that's not one of the considerations.

MR. ANDERSON: Yes.

MR. HARMON: But he, his question of competency will be decided prior to August 5th and 6th, won't it?

THE JUDGE: Well, he's already been determined. He's found to be incompetent. He's at the State Hospital –

MR. HARMON: Oh.

THE JUDGE: – and being treated with the hope that he's going to be found competent.

[17] **MR. HARMON:** Okay. Well, I'll work with his counsel on that, Your Honor.

THE JUDGE: Okay. Anything else we need to take up today?

MR. ANDERSON: No. Thank you, Your Honor.

THE JUDGE: Okay. I'll . . . The motion to suppress and the motion to dismiss were all denied.

WHEREUPON, the hearing was concluded.

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[18] **REPORTER'S CERTIFICATION**

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded audiotapes #5-23-02 1 and 2 in the matter of STATE VS. AFTON CALLAHAN, hearing date May 23, 2002, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 18, inclusive except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 19th day of May, 2003.

/s/ Penny C Abbott
PENNY C. ABBOTT, COURT REPORTER
License 22-102811-7801
Notary Public, Comm Exp 9-24-04

[SEAL]

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COMM. EXP. 09/24/2008

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR MILLARD COUNTY,
STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. AFTON DALE CALLAHAN, Defendant.	CASE NO. 021700044 JURY TRIAL (VOLUME I)

BEFORE THE HONORABLE
DONALD J. EYRE, JR.

FOURTH DISTRICT COURT

765 SOUTH HIGHWAY 99

FILLMORE, UTAH 84631

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

AUGUST 5, 2002

VOLUME I

[2] APPEARANCES

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[5] Monday, August 5, 2002

THE COURT: I apologize for the delay. There was some confusion, but we're back under control. We welcome you here to court today. We'll go on the record in the case of State of Utah versus Afton Dale Callahan. . . .

* * *

[42] Mr. Anderson, you may make your opening statement.

MR. ANDERSON: Thank you. Kind of put me on a short leash here. I suppose that's so I don't move around too much. Can you hear me all right?

I'm Dexter Anderson, as I said, the deputy county attorney assigned to prosecute this case. When the Court refers to the State's attorney, that's me, in this case.

The Court indicated the purpose of an opening statement is to try to advise you of an outline of what the [43] State believes the evidence will show in this case. It's a little bit strange that we spend [sic] a lot of time this morning picking you for what you didn't know about the case, and now we're going to do our best to tell you everything about the case. I hope I don't try to go into all of the details. Again, I want to spend a little bit of time with you this afternoon telling you about the case so, and maybe some of the witnesses, so you understand where the State's case is going.

This case is about Afton Dale Callahan, and he's been introduced to you, sitting at counsel table. It's also going to be about two other named individuals, Adam Evans and Mick Evans, who the State alleges were present when Mr. Callahan committed his acts. Because the State has alleged that Mr. Callahan acted in concert with two or more persons, which is one of the things that you will need to consider in deliberating the case.

It is about methamphetamine. This case is about methamphetamine. That's kind of a long word, and

it's an unlawful street drug, is what it is. Maybe you've heard something about methamphetamine, maybe you haven't. But I think it will become clear in the evidence that you have before you today, and possibly tomorrow, that it is an illegal street drug, and in violation of the law to either possess it or to sell it, or possess it with the intent to sell it. It's also a type of drug where you're not dealing with big [44] quantities. You're talking about grams. You're talking about milligrams of material. So there's not a great deal of material that you'll be looking at, but it's still, in spite of the fact it may not look like much, it's still a controlled substance, an illegal drug to possess. And the fact that the amount that [illegible] these kind of materials, deal in such small quantities creates a problem for law enforcement in trying to enforce the laws that we have that makes this kind of activity illegal. And the problem creates a situation that maybe you're not familiar with, and that is that law enforcement is almost always required – not required, but need to catch people in the act of committing the crime. In other words, it's not like a bank robbery or something like that where there might be a lot of evidence left over from the crime, and maybe a homicide or maybe some other kind of a crime where the evidence is left over and the police can follow an evidence chain to finally find the perpetrator. The police almost always need to catch people in the act of committing these crimes, actually while it happens. And because that seems to be the problem that law enforcement has to use, they use confidential informants to try to find those who possess, in this case,

methamphetamines, and those who are willing to sell or distribute methamphetamine to others. And that's the situation, with that introduction, that's the situation that you'll find in [45] this case, in the evidence and in the witnesses.

Millard County is a member of what they call the Central Utah Task Force. It's a law enforcement agency made up of several counties. I believe Millard County, Sevier County, Beaver County and Piute County, that form a task force for the purposes of conducting these types of surveillances and these types of investigations into drug crimes. It's set up as a special agency to enforce the antistreet drug legislation that we have in the state. And so we're going to be hearing from members of a task force, the Central Utah Task Force that was involved in this case. Some of the officers will be local officers, some of them will be officers from out of the county, but still have the assignment and the duty and the obligation to investigate these types of crimes within the county.

Let me get down a little bit to the particular alleged facts in this case, what the State believes that the evidence will show. On March the 19th of this year, 2002, here in Fillmore, Millard County, Utah, and sometime prior to that, the task force had been dealing with a confidential informant, and that's Brian Bartholomew, who you were introduced to this morning, a young man who himself had had problems, perhaps with illegal drug use, but he had agreed to act as a confidential informant with the

task force because he understood some of the elements that were around that might be [46] in the business of selling narcotics. And so he was acting with the task force, and had been giving information to them.

On this particular day in question he had information that the defendant, Afton Dale Callahan, was going to acquire some methamphetamine to be distributed. And he reported that earlier in the day to his controlling officer. And I believe that that was Officer Jeff Whatcott, and told him perhaps Afton Dale Callahan would have methamphetamine for sale later that evening. [Brian] Bartholomew, also later that evening, went to the home of Afton Callahan, which is in what I call the Chalk Creek Trailer Park in Fillmore. Some people call it the Clough Trailer Park. It's on the north end of town where several mobile homes are located, trailer homes are located in the park, within Fillmore, and also within a thousand feet of the Catholic church that's on the north end of town.

Brian Bartholomew went to number nine in the trailer park, where he knew Afton lived. And around eight, 9:00 o'clock, went into the house, and Afton showed him five bindles of methamphetamine. What we're talking about is little square packets, packages of cellophane – not cellophane, little plastic baggies containing a white powdery substance. And Afton advised him that he could purchase one of those for a hundred dollars if he had a hundred dollars. And Brian left the house. He reported this to Officer

Dwight Jenkins, I believe. And the officer then met with Brian [47] Bartholomew and set him up with what follow what we call a controlled buy. In other words, Brian was certain, I guess is the word, I guess to make sure he didn't have any controlled substance on him, his person, planted a – not a receiver, but a microphone that would pick up any conversations that might take place in his presence; instructed him on how to proceed from that point, to go back to Afton Callahan's house and otherwise set up surveillance of Brian Bartholomew as he went to the house.

Several officers were involved. You've met probably all of them that will testify. Officer Jeff Whatcott, Dwight Jenkins, Officer Clark Thomas, Commander Cordell Peterson – excuse me, Pearson, Cordell Pearson. And there may have been others involved in the surveillance. In other words, they were located in situations where they could watch or listen to what happened. As Brian Bartholomew went back to number nine in the Chalk Creek Trailer Park to see if in fact Afton Callahan would sell him methamphetamine. Mr. Bartholomew had drank some beer earlier in the day, right after work. But the officers observed him and watched him and were confident he could perform his duties without there being any affect from the alcohol he had consumed that day after work. About 11 clock, in fact, they were with him for two or three hours, before he actually went back over to the house. And they will testify about Brian's situation and condition at that time. [48] They

watched him as he – actually they gave him a ride over. Brian lived pretty close to the Chalk Creek Trailer Park. But they gave him a ride over to the Chalk Creek Trailer Park, to number nine, let him out a short distance from the home. Obviously they didn't want the occupants of number nine trailer in the Chalk Creek Trailer Park to see the police were around. So he walked a short distance to the home, went in, knocked on the door, was invited in, and went in. There was three individuals in the home at the time. Afton Callahan was there, Adam Evans was there, a young man in his twenties, early twenties. Adam's brother Mick Evans was there, another young man I believe in his early twenties. They were there with Afton Callahan in the house. They had a conversation, just talking generally about things. And finally Brian asked Afton if he could get the stuff. And Afton goes to the refrigerator in the home, and gets out the package containing five, I believe, different baggies of white powdery substance. And he laid them on the table to give Brian Bartholomew a pick of what he wanted. Brian picked out what he will testify to looked like the best or the biggest, or whatever, and handed Afton Callahan the $100 bill. During the process of the task force preparing Brian to go back over to the house, they had furnished him with a $100 bill. They had photographs talk [sic] copying the 100-dollar bill so they could recognize it later if they saw it. They gave that to Brian, and when he was [49] dealing with Afton there in the kitchen or in the home, picked out the baggy that he was purportedly

purchasing, picked it up and handed Afton the $100 bill.

Brian Bartholomew then, according to the instructions he had been given by the task force, was to make an excuse, said he had to get home, and walked out of the mobile home.

The other three individuals that were there, Afton and Mick and Adam, basically followed him out on the porch. And as they came out on the porch, the officers who were surveiling the situation moved in and basically arrested all four individuals. They obviously didn't intend to arrest Brian, but other than to make it look like they were. So they basically put all four of them on the floor of the porch, outside the trailer. One officer, Officer Jeff Whatcott, retrieved from Brian Bartholomew the baggy of methamphetamine that he had in his pocket, that he had just purchased from Afton. Officer Commander Cordell Pearson was involved, and he dealt with Afton. He found the $100 bill that had been exchanged for the controlled substance in Afton's pocket. And you'll have the copy of that $100 bill to look at, and the testimony of Commander Pearson saying that's where he found it.

When the officers – and you can imagine its dark. And the officers converged on the porch, the individual there saw the officers coming, and probably realized what was [50] happening, what was coming down. As Officer Dwight Jenkins approached the porch, he saw Afton Callahan, the defendant here, reach in his pocket, or on his person, and toss onto

the porch a larger baggy. That was later recovered – excuse me, it wasn't Jenkins. Clark Thomas, Officer Clark Thomas, part of the task force that converged on the front porch, saw Afton toss a larger baggy on the porch just as he was being taken down by the other officers. That baggy was retrieved by the officers after they got the situation under control, and found that it contained the other four baggies that Afton had earlier had in his refrigerator.

Quickly the officers then advised all three of these individuals of their Miranda rights, and sought permission from Afton Callahan to search the house. Afton Callahan gave permission; basically told the officers that there was not any drugs in the house, but "you can search." As they searched the house, they got information that there was a package of syringes in the kitchen cupboard that can be used to ingest methamphetamine. In fact, the officers had information that these three individuals had earlier been using methamphetamine with syringes in the house. So they found a packet of syringes in the house. And you'll have those to look at some evidence. They also, in the process of searching Adam Evans, found a similar syringe from his pocket. They also found a similar syringe in Mick Evans pocket. Again, these items will [51] be in evidence for you to look at while you hear the testimony of the officer who discovered this, these items of evidence.

On the way out to, Afton Callahan was brought out to the public safety building under arrest. After having been advised of his Miranda rights, and some

them on the way out, he told the officer – I believe the officer is Clete Carter. But he told the Millard County Deputy Sheriff that they had missed some drugs. And the officer asked, "well where." And Afton said, "well either on Mick or Adam. Nick or Adam has some more." So when they got the individuals out here, Adam was searched and found he had some sort of a belt buckle that had a secret compartment in it. Inside the belt buckle he had some more methamphetamine packets, in the belt buckle.

I want to say that we intend to call some – what happens when suspected narcs, suspected illegal street drugs are located in a case like these, they're always handled carefully to make sure integrity is not compromised, and sent to the State Crime Lab for analysis. This material that was found in this incident was sent to the Cedar City Crime Lab, where a criminalist – and that's what he calls himself, a criminalist, not a criminal, but a criminalist examines – that's his job, being a chemist, I believe, and he has a lot of other training and experience and equipment that he uses to test material to determine what it is. And he will come and testify that he had this material and tested it, and found it [52] to be methamphetamine. And he'll be able to tell you how much there was, and what he thought it was, and be able to tell you the process he uses to determine what type of material it is.

Part of the material also went up to the State Crime Lab in Salt Lake for purposes of checking to see if there were any fingerprints on the baggies. And

a gentleman from the Crime Lab, Larry Marks, will testify that he works in the Crime Lab, and that's part of his job, is to handle evidence that is sent up there. They did not find any, what we call, usable fingerprints on the baggies. And so they were – the baggies that did go up there, not all of it did, but some of it did, was turned back over to the Task Force officers, who brought the evidence back down here. And we have it here today for purposes of placing it into evidence. So you'll have the testimony of the Crime Lab experts.

A couple of other quick witnesses, so you know who they are before they actually get here. Fre Ayoub will be here to testify that he's the father or pastor of the Catholic Church here in Fillmore located close to the Chalk Creek Trailer Park. And it is in fact a church where people attend services of that faith. And the reason for that is, the law provides that any distribution of controlled substances, or any possession of controlled substances, or possession with the intent to distribute controlled substances, or even possession of paraphernalia that takes place in what we call a [53] Drug Free Zone, it enhances the crime and makes it a more serious one because it's the idea that drugs should not be in these drug free zones. And it describes a drug free zone as anyplace within a thousand feet of a church, school, and a lot of other different things. But for purposes of this case we're only talking about the church. His purpose is simply to come and verify the obvious, and that is that this building in Fillmore is the Catholic church.

Officer Bill Jackson was also involved in the situation on March the 19th, and he also – and he may have some testimony about some of the things that he did that night. But he also will testify that he specifically had the assignment of measuring the distance between the trailer home, about the middle of Callahan's where this incident took place, and the Catholic church. And I believe he'll testify he added up the feet between the two. So again, the purpose there is to show this incident took place within a thousand feet of the church, Drug Free Zone.

There may be some other witnesses we may call maybe on rebuttal. I won't necessarily try to go over what their testimony might be. They may or may not be called. I would also want to say that I may not have touched on every little piece of testimony or evidence that may come out in this case, and it's not because its a not important. It may be important, it may be important to you. But I'm trying to just [54] simply give you a summary of where the case is and where we're going to be going with the witnesses, so the evidence is better and you can better follow from the witness stand what the State's case is. Because the Court will instruct you, you will be deciding the case based upon the evidence. Not necessarily on what the attorneys say the evidence is, but what you actually in fact hear from the witness stand. And I would like to have you listen, if you would, carefully, to each of the witnesses and look at the evidence, and take into consideration the arguments that I might make, as well as the instructions of the Court in

reaching your decision in this case, when we get to that point.

The State is asking that you find that Afton Callahan is guilty of all three charges, as charged. The evidence will be strong, and my argument will be that it proves each and everyone of these counts against Afton Dale Callahan beyond a reasonable doubt. And we'll ask you to return that verdict when we finish with this case.

THE COURT: Thank you, Mr. Anderson, Mr. Harmon?

MR. HARMON: I believe we intend to reserve it until we begin to present our evidence.

THE COURT: Okay, Mr. Anderson, call your first witness.

MR. ANDERSON: Call Sheriff Ed Phillips.

THE COURT: Sheriff Phillips, come forward and be [55] sworn, please.

EDWARD PHILLIPS

Called by the State, having been duly Sworn, was examined and testified as follows.

THE CLERK: You do solemnly swear that the testimony you are about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Have a seat.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q. Would you state your name for the Court, please.

A. Ed Phillips.

Q. Your position or occupation in the county?

A. I'm the elected sheriff of Millard County.

Q. How long have you been sheriff of Millard County?

A. I'm serving in my 24th year in that capacity.

Q. Were you so elected then in March of this year?

A. Yes.

Q. Does the sheriff have the responsibility of enforcing controlled substance laws in Millard County?

A. That is part of our duty, enforcing all laws, [56] including the controlled substance laws of the State of Utah.

Q Do you have a particular means or method for fulfilling that responsibility in Millard County?

A. Primarily we do through our membership and participation in the Central Utah Narcotics Task

Force, which is participated in both by personnel and money towards the operation of that task force by Millard County. We join with Sevier, Sanpete, Piute, and Wayne counties in the operation of that task force.

Q. And does that task force have your authority to operate within Millard County?

A. They do. When they're operating within Millard County they are under the authority of my office as part of the agreements that all five of these counties have signed, joint agreement, that has formed this task force.

Q. Sheriff, do you have any idea how long the task force has operated in Millard County then?

A. We've been a member of it for approximately a year now, may be a little over a year. The task force has been in operation for several years. I can't tell you how many, but it's been in operation several years, and we just joined it a year ago.

Q. They would be authorized to operate in Millard County in March of this year?

A. They would.

[57] Q. Would you name the task force, some of them you're familiar with.

A. Specifically the commander, Cordell Pearson who I've been acquainted with a number of years as former sheriff. And I've known him and associated

with him for a number of years. He's a the director and commander of that task force.

Q. Is there a Millard County deputy on that task force?

A. The one person we provide is Deputy Sheriff Jeff Whatcott. Jeff has worked for the Millard County Sheriff's office for, I believe, 22 years.

Q. Do other officers have authority to assist the task force as called upon?

A. Regularly as the task force operates in Millard County they'll have a need for assistance and utilize other deputy sheriffs that work out of the office in connection with their investigations and work they do connected with Millard County.

Q. From your perspective, could you tell the jury why you chose to participate in this area of law enforcement?

A. It became apparent to me we probably should have joined and participated in it sooner than we did. But narcotics investigations, as the county attorney has explained earlier, is a very difficult and very specialized field. In order to conduct investigations that are necessary, as we had operated in the past – I think with still a great deal of [58] success – utilizing just the officers here in Millard County, it became a fact to me we were going to have to step up into a little different program, different league – if that's a good choice of words – and operate jointly with these other counties, both for the versatility of

having different personnel working here in our county, the people may not be familiar with. And because of the tremendous amount of interaction we've been able to track and find the flow of narcotics back and forth across our neighboring county lines.

Q Did you know the defendant, Afton Callahan?

A. Yes, I do, I'm acquainted with Afton Callahan.

Q. Is he in the courtroom?

A. Yes, he is. In the red shirt, seated.

MR. ANDERSON: May the record reflect he's identified him?

THE WITNESS: In the red shirt seated at the defense table.

THE COURT: The record may reflect he has identified the defendant.

MR. ANDERSON: I have no other questions of this witness.

THE COURT: Mr. Harmon. cross-examination.

[59] **CROSS-EXAMINATION**

BY MR. HARMON:

Q. Sheriff Phillips, could you tell us if there are any specialized equipment that's used by the Central Utah Narcotics Task Force?

A. Certainly there is specialized equipment that they use.

Q. Could you describe some of that for us?

A. Some of it would be as was described in the prosecution's earlier statement, and that being what we refer to as a bug or a wire, which is a transmitter that can be either placed on someone or in a strategic location, and will transmit voice communications.

Q. Has your office had extensive training and experience using equipment like this?

A. Yes. We've owned and operated that particular type of equipment for at least 22, if not the full 24 years I've worked there.

Q. During the period of time has this equipment improved in its ability to transmit radio signals?

A. If I understand your question, does the system work?

Q. Has it improved from when you started?

A. Oh, has it improved. To some degree it has, but still it's right back to the basics of radio transmitters and receivers. It's become packaged a little bit differently, but [60] I think as far as the overall effectiveness of it, I don't know that it's greatly improved over that period of time.

Q. And is this type of equipment purchased by your department and supplied to the task force?

A. It's what I would refer to as a mix and match. We had previously owned some of the kind of equipment, and the Task Force, as it was formed when we joined it, also had equipment. So our equipment has been made available to the Task Force. I presume that they have used it on occasions. And they do have the similar type equipment or same equipment within their operation.

Q. In addition to the transmitter that you called the bug, and the receiver, do you also have recording equipment that records the conversations that are received?

A. There is recording equipment that is available. Sometimes its used, sometimes it isn't, depending upon the situation.

Q. Is this equipment what we would call "state of the art?"

A. I think for the most part it is.

Q. Do you think its as good as can be bought?

A. As far as I'm aware, it is.

Q. Now in addition to having the equipment, is there special training given to the officers who run this Task Force?

[61] A. There is.

Q. And would that be true of Jeff Whatcott, the deputy from Millard County?

A. That would be true. I'm probably more aware of his training than I would be the other Task Force officers. As I stated, Jeff has worked for me for a number of years, and many of those years has been operating this type of equipment. He had been sent to various schools where they're taught the proper methods of using it, mostly to get the maximum use and benefit out of the type of equipment. But he would be well trained in it.

Q. And in addition to being trained in the equipment use, is he also trained in the systems, the method of investigation?

A. I surely think so.

Q. Have you been particularly concerned about having your deputies properly trained?

A. Yeah. I guess concerned would be a fair word. It's something we've spent a fair amount of resources and time in training; not only just to meet the basic requirements and the annual requirements, but probably the extra mile in training.

Q. And would it be fair to say that your department is quite aggressive in seeing that appropriate training is given to your officers?

A. I think it's as good as any. It's something we pay [62] close attention to.

Q. Now, are there standards that have been developed with regard to how drug investigations are to be undertaken?

A. You know, I wouldn't characterize it as standards. There's certain operational procedures that hold true for any type of an investigation. Narcotics, even though it's a different type of an investigation, all investigation procedures are pretty basic.

Q. Are those reduced to writing? Is there a set of written procedures and standards?

A. There is a set of operational policies and procedures of conducting investigations that my office has.

Q. And do those cover the use of confidential informants?

A. Yes.

MR. HARMON: That's all I have.

THE COURT: Mr. Anderson, anything else?

MR. ANDERSON: No, Your Honor.

THE COURT: You may step down. Thank you. Next witness.

MR. ANDERSON: We call Officer Jeff Whatcott.

THE COURT: Come forward and be sworn, please.

[63] **JEFF WHATCOTT**

Called by the State, having been duly

Sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the testimony you are about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Have a seat.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q. State your name for the court, please.

A. Jeffrey G. Whatcott.

Q. And your occupation?

A. I'm a detective for Millard County Sheriff's office, assigned to the Central Narcotics Strike Task Force.

Q. How long have you been employed with the Millard County Sheriff?

A. Approximately 19 and a half years.

Q. Is that the extent of your peace officer employment, or is there other?

A. No, that's it.

Q. What training have you had then to be a peace officer in Utah?

[64] A. I completed the standard POST training at the beginning of my career, and have maintained

the minimum, at least minimum 40 hours a year – mostly it's more than 40 hours a year – to maintain my certification as a peace officer here in Utah.

Q. And do you have a special assignment at this time?

A. Yes. I'm assigned to the Central Utah Narcotics Task Force.

Q. How long have you been assigned to the Task Force?

A. Approximately a year, just a little over a year.

Q. That would include last March of this year?

A. That's correct.

Q. Do you know Afton Dale Callahan?

A. I do.

Q. Is he in the courtroom today?

A. Yes, he is. He's in the red shirt at the defense table.

MR. ANDERSON: May the record show he's been identified, Your Honor?

THE COURT: He's identified the defendant.

Q. (BY MR. ANDERSON) How long have you known Afton Callahan?

A. I've met him a couple times prior to the 19th, knew who he was. But as far as knowing him, not – just knowing who he was was just about all.

[65] Q. Could you give us your summary, I suppose, of the mission of the Task Force?

A. We're assigned to investigated any drug, narcotic violations that are brought to our attention within the five counties that the sheriff mentioned.

Q. How many members – how many members are there in the Task Force?

A. We have five members assigned to the Task Force, besides an individual that does intelligence work on the computer and stuff.

Q. Can you tell the jury what a confidential informant is?

A. It's a person that we use. Sometimes we call getting a twist or catch them involved in narcotics. They agree to help us to try to locate or find other individuals that are already involved with the drug business or narcotics business selling.

Q. Why do you use those types of confidential informants?

A. Cause [sic] it is pretty hard once, in these small communities, especially for an officer, especially like myself who has been in Millard County 18, 19 years working here, to go out and buy illegal drugs from individuals around here. They won't sell to me. I have to work with confidential informants.

[66] Q. Have you worked with confidential informants before the Task Force?

A. Yes, I have.

Q. Do you have any special training in the area of using confidential informants in narcotics law enforcement?

A. Yeah. I have received some training through the years on different occasions, on how to manage and supervise confidential informants.

Q. How common or uncommon is it to use these types of confidential informants in the work you're doing now?

A. They're very common. They're used all over the nation.

Q. Do you know Brian Bartholomew?

A. Yes, I do.

Q. Will you tell the jury then how it is you know him.

A. I become [sic] aware Brian was arrested earlier in this year, I can't recall the date, late January, I believe, for drug violations. The officers that arrested him had caught him. He had been in trouble before, and he had talked with them and said he needed to get some help to try to get out of the drugs, and wanted to help himself, but also wanted to help law enforcement catch other people involved in illegal drug activity.

Q. Did you contact Brian?

A. Yes, I did.

[67] Q. Was there an agreement or understanding then with Brian?

A. Yes, there was.

Q. Would you tell us what it was?

A. He agreed to work as a confidential informant to bring us individuals that were involved with the sale of illegal drugs, narcotics, here in Millard County, that he knew.

Q. How long had you worked with Brian before this matter came to your attention?

A. Probably four to six weeks.

Q. Was he receiving any payment?

A. The deal was with Brian, and as with all of our confidential informants, that are caught with – or have charges against them, they do not walk scott free, but their charges may be reduced or Jail sentences reduced.

Q. Is this an ordinary method of using this type of confidential informant?

A. Yes, it is.

Q. Would you tell me whether or not you received any information from Brian on or about the day in question, March 19?

A. Yes, I did. I received a page to call Brian approximately 11:00 o'clock in the morning on the 19th of March, this year.

[68] Q. Where were you when you received the call?

A. I believe I was in the Delta area at the time I received the page.

Q. Were on you [sic] duty?

A. Yes, I was.

Q. Do you know where Brian was?

A. Umm, I believe he was on his cell phone, so I can't tell you for sure where he was at.

Q. Could you tell the Court then what information you had?

A. When I contacted –

MR. HARMON: We would object to any conversation between Officer Whatcott and this young man. That's clearly hearsay.

THE COURT: Isn't it, Mr. Anderson, hearsay?

MR. ANDERSON: Your honor, I'm not claiming it to be evidence or proof of the particular matter that may have been stated by Brian to the officer, but rather, it was just a statement made.

THE COURT: Well, you can elicit in a conversation what the – the contents of that conversation is hearsay. I'll sustain the objection. He can tell what he did in response to the conversation, but the contents of the conversation is hearsay.

Q. (BY MR. ANDERSON) Without saying what was received, [69] just tell me whether or not you did receive information from Brian Bartholomew.

MR. HARMON: Again, Your Honor, we object. We can't refer to that conversation in any manner.

THE COURT: You can ask if he had a conversation and the foundation for that, but not on the content. Overruled.

THE WITNESS: Yes, I had contacted and received information from Brian Bartholomew.

Q. (BY MR. ANDERSON) What did you do in response to the information you received from Brian?

A. At that time it was early enough in the day I told him if he had any further information to contact me later.

Q. Did you have further contact with Brian Bartholomew later that day on March 19th?

A. Yes, I did.

Q. Do you recall how the contact was made?

A. Brian had contacted Detective Jenkins, who contacted me. And then I contacted Brian by telephone.

Q. What did you doing [sic] then in response to that conversation?

A. With the information he gave me, I told him I needed to meet with him immediately, and he advised he was in the Fillmore area, and I responded to Fillmore where I met with him.

Q. So you came from where to where?

[70] A. From my home in Holden to here in Fillmore.

Q. Did you meet with Brian Bartholomew?

A. Yes.

Q. Do you know what time that was?

A. It would have been approximately 9:00 p.m. in the evening.

Q. The same date, March 19th?

A. That's correct.

Q. Where did you meet with Brian?

A. I met with him on a road just below Fillmore here at the airport.

Q. Was anyone else present?

A. No, there was not.

Q. What did you do or go from that point?

A. After talking with Brian we came back to the sheriff's office here in Fillmore.

Q. About what time was that?

A. Between 9:00 and 9:30.

Q. Did you meet with any of the other Task Force members?

A. Yes. They had responded from their homes to the sheriff's office also. It look them -- they wasn't there at that time, but they arrived a short time later.

Q. And was Brian in your presence at all times when you met him in the local area?

[71] A. Yes, he was.

Q. Who else responded to the Task Force; do you recall?

A. Commander Cordell Pearson, Clark Thomas and Dwight Jenkins and also Piute County Sheriff Marty Gleave came with Commander Pearson.

Q. Did you meet together with Brian Bartholomew then?

A. Yes, we did.

Q. Without talking what was said, would you just tell the jury what you did, what the purpose of the meeting was.

A. We were briefed on the information that he had, set up a plan of how we wanted to run the operation, and a couple of the officers went down and surveilled the residence.

Q. What residence was that?

A. The Afton Callahan residence.

Q. Where at?

A. In the Clough Trailer Park or Chalk Creek Trailer Park, number 9, here in Fillmore.

Q. In Millard County?

A. Yes.

Q. What did you do with Brian at that time.

A. At that time he was in our presence every time he was here. He was searched and given a transmitter prior to going to the Callahan residence.

Q. What's [sic] is the purpose of the transmitter?

A. It's to enjoy the safety of the confidential [72] informant, and to listen to – try and listen to the conversations that take place between the confidential informants and the suspects.

Q. And how do you receive what the transmitter transmits?

A. We have a receiving unit that has an antenna that attaches to it. We place it in our vehicle. It has a recorder in there that records. Besides, also you can listen to it while it is recording.

Q. What else did you do with Brian Bartholomew?

A. During the time he was here, also he had advised that he had been drinking. He was given several cups of coffee. We monitored him closely, talked to him, and felt like he was competent enough to do the job we had for him.

Q. How was he acting?

A. He appeared to be fine at the time we left here.

Q. What instructions did you give to him?

A. The plan was that we gave him a hundred dollar bill to make the purchase. And also instructions were for him, once he had made the purchase and left the residence, that he was to act like he was going to play the drums that were on the porch of the residence, so that would be our que to enter the residence. Until then the deal hadn't been made.

Q. Were you given any instruction about his what to say or what to talk about or how to act, anything of that nature?

[73] A. No, other than he wanted to play the drums or something. I could see he was leaving. I

wanted to hear as much conversation as I could about what was going on, but nothing specifically.

Q. Was he given any time restraints or anything of that nature?

A. No, he was not.

Q. And you talked about surveillance. What plan or method of surveillance was set up?

A. We had the officers go down and look at the residence to see approximately where it was, what would be the best way to get in there without being noticed, get up close to it. We had officers that were, after the deal had taken place, that were going to enter the residence. We were looking for places they could get into the trailer and without being seen as quickly as possible after the deal was done.

Q. Were there arrangements then or equipment for receiving the body bug transmission?

A. Yes, there was.

Q. Where was that?

A. In my vehicle.

Q. Who was operating it?

A. I was.

Q. Did you do anything to determine whether the body bug was operating properly?

[74] A. Yes. We checked it prior to leaving the sheriff's office. I had it on so I could hear the conversation and stuff, followed close by and could hear the talking, make sure it was receiving properly.

Q. And you hear what was being transmitted over the body bug?

A. Yes.

Q. Is there any way that any other transmitter could have been broadcasting to your receiver?

A. It's possible, but it didn't happen that time.

Q. Were there any arrangements or equipment available for recording what happened and what was received by your receiver?

A. Yes. There's a cord hooked up to the recording device, and it was activated prior to Brian entering the residence.

Q. And do you know whether or not that was operating properly?

A. It appeared to be, yes.

Q. Did you in fact hear conversations over the body bug?

A. Yes, I did.

Q. Both before entry of the home and after?

A. That's correct.

Q. Just tell me then – well tell me about the $100 bill. What was done with that?

[75] A. Prior to Brian leaving the office, we photocopied a hundred dollar bill, which was given to him. And then we kept a copy, photocopy of it, so later on if we come up with that hundred dollar bill, we can compare the serial numbers to show that's the one we gave the confidential informant, and where it may be found.

Q. Do you have that copy with you?

A. Yes, I do.

MR. ANDERSON: May he retrieve, that Your Honor?

THE COURT: He may. Do you want to have him take it out of the envelope and have it marked?

MR. ANDERSON: Yes, Your Honor. May I approach the witness?

THE COURT: You may.

Q. (BY MR. ANDERSON) Officer, look at the exhibit mark in the upper left-hand corner and tell me if you recognize the exhibit?

A. Yes, I do.

Q. Tell the jury what it is.

A. A brown manilla envelope that the Task Force uses to store evidence in.

Q. What was this particular envelope used for?

A. To store the Xerox copy of the $100 bill we used that night.

Q. How do you know that?

[76] A. Because it has my initials on it.

Q. When did you put the exhibit in Exhibit Number 1?

A. It was placed into evidence that night, on the 19th of March, this year.

Q. Would you look at Exhibit Number 2, and tell me what that is?

A. This is a Xerox copy of the $100 bill we gave to Brian that night of the 19th.

Q. And where did you put Exhibit Number 2 then after you made the copy?

A. It was placed into this round envelope marked Exhibit Number 1.

Q. And how did it get here to court today?

A. Detective Jenkins brought it over from Richfield.

Q. How do you know that Exhibit Number 2 is a copy that you made?

A. I wrote -- whenever I make a copy of money when I do these deals, I always mark a date up in the

corner so I know when it occurred. And that's my handwriting, 3/19/02 in the upper left-hand corner.

MR. HARMON: I have no objection to that exhibit, Your Honor.

THE COURT: They're received.

(State's Exhibit Nos. 1 and 2 were received into evidence.)

[77] Q. (BY MR. ANDERSON) Do you know what the street address of the Chalk Creek Trailer Park is?

A. It's on 300 north, on the east side of the road. I don't know the exact east on it, but 300 north here in Fillmore.

Q. Main Street?

A. Yes.

Q. Would you describe the trailer park as best you can, just describe how it's laid out, where the trailers are.

A. The 300 north runs east and west from Main Street. You come in a short distance, and then the road end of the trailer court kind of makes a semi circle. And there's trailers around in a semi circle and two or three in the center part.

Q. And where is trailer number 9?

A. It sets – as the road comes around it sets running east and west parallel to 300 north that way,

and there's a couple other trailers that run north and south to the south of it.

Q. Well, would you describe what type of trailer it is, single wide, double wide?

A. It's a single wide trailer. I don't know how long it is. There's a small wooden porch that's been attached to the trailer, approximately 8 by 10, with a door that goes into the porch prior to going into the trailer.

[78] Q. Prior to this night had you ever been in that trailer?

A. No, I had not.

Q. Would you describe for the jury then, you were on surveillance, is that correct, at the trailer?

A. Not until we went down there with Brian. I was parked to the north.

Q. You transported Brian down there?

A. I did not. Detective Thomas did.

Q. Did you go down about the same time?

A. Yes, I followed them down.

Q. Do you know about what time that was?

A. We left the sheriff's office shortly after 11:00 o'clock, probably five after 11:00 that night, and arrived three or four minutes later.

Q. Had Brian been in your presence during that approximately two hour period?

A. Yes, that's correct.

Q. Where did you go then at the location?

A. I parked on the north side of 300 north, just about due north of the trailer. I was less than a half a block away.

Q. Do you know whether or not your receiver was working, receiving transmissions from the body bug?

A. Yes, it was receiving.

[79] Q. What happened then after everyone was in position? What did Brian do?

A. He was let out of the vehicle and walked up the street, around the semi circle part of it, and went into the trailer.

Q. Were you able to observe that?

A. I observed him up to a point where he made the turn I couldn't see him any further than that.

Q. What were the lighting conditions at this time?

A. It was dark. There were a few house lights around, but no street lights where you could see – where I could see real good from where I was at.

Q. What were the weather conditions?

A. It was clear. There wasn't any storm or anything.

Q. Were you able to hear a conversation over the body bug?

A. Yes, I did.

Q. Would you tell the jury what it is you recall hearing.

A. I recall when Brian entered the house I could hear him –

MR. HARMON: May I voir dire the witness?

THE COURT: Go ahead.

[80] **VOIR DIRE EXAMINATION**

BY MR. HARMON:

Q. Was there a tape recording made of this conversation?

A. Yes.

MR. HARMON: We would submit that playing that recording is the best evidence, and should be played other than the officer testifying.

THE COURT: Your response, Mr. Anderson?

MR. ANDERSON: Well we can listen to the tape. I think that's been provided to counsel. He should be aware of what's on it. We can play the tape.

I guess we would have to take a break and get a quick player.

THE COURT: I'm going to permit him to testify as to what he recalls. Clearly the tape is the best evidence. I'll require that you play it also. You may proceed. When we have a break, make arrangements to set up the tape.

DIRECT EXAMINATION (cont'd.)

BY MR. ANDERSON:

Q. Do you recall the question? I just asked you if you could recite to the jury what you overheard on the receiver.

A. I heard Brian enter the house, knock on the door. I heard him go in. I could tell there was more than – sounded like two or three individuals in the house. I couldn't distinguish who was who. I could hear either a stereo or TV [81] playing. One of the bad things about these equipment things is they pick up stereo and TV real well. But I could hear conversation in between. I could hear them talking about the purchase price of a C-note, which is slang for a 100-dollar bill. I heard Brian talk to an individual, and he asked him why he was keeping it in the refrigerator to keep it cool. There was other conversation. I can't recall exactly all what was said. Some of it I couldn't distinguish. I heard Brian say he was leaving, and that when he got out on the porch I could hear him say that he would like to play the drums

that were on the porch. And that was the key to us that the purchase had been made, and that's when I advised the other officers the deal had been made and they could enter the residence.

Q. How did you know to identify the other officers they could move in?

A. When I heard Brian say something about playing on the drums. He wanted to play the drums on the porch, and that is when I advised the other officers the deal had been made.

Q. Could you see the trailer at that point?

A. I could see a small portion of the north end of the trailer where I was at, but I couldn't see the porch. I was on the north side.

Q. Could you see the other officers moving in on the location?

[82] A. No, I could not.

Q. Just describe then what you saw and what happened, from your perspective.

A. I gave them the word that the deal had been made, that Brian was on his way out, and until I pulled up around there a short time later, I didn't see anything that went on as they entered in.

Q. Describe the scene then as you did see it.

A. When I pulled up there, I went into – as I started in the door on the porch, I noticed Brian was

laying face down and there were three other individuals laying face down on the porch.

Q. Did you identify any of the other individuals besides Brian?

A. I recognized the defendant, Afton, and later learned the other two were Mick and Adam Evans.

Q. What role did you play at that point?

A. At that time I made contact with Brian while he was laying on the ground there, handcuffed behind his back. I began searching him, and at that time he told me the bindle he had bought was in his change pocket.

Q. What did you do?

A. I retrieved that small bindle from his change pocket and continued searching him.

Q. Did you bring that bindle with you to court?

[83] A. Yes, I did.

MR. ANDERSON: May he retrieve that, Your Honor?

THE COURT: He may.

MR. ANDERSON: May the witness open the package, Your Honor?

THE COURT: He may.

MR. ANDERSON: May I approach the witness.

THE COURT: You may.

MR. ANDERSON: May I mark the exhibits?

THE COURT: You may.

Q. (BY MR. ANDERSON) Officer, would you look at Exhibit Number 3, and just tell the jury what that is, if you recognize it.

A. It's another brown manilla envelope that the Task Force uses to store its evidence in. It was used that night, on the 19th.

Q. How do you know that?

A. It's got the evidence tape we use with my initials on the envelope.

Q. Did you put the evidence in Exhibit Number 3 yourself?

A. I don't know if I did myself or Commander Pearson did, but I was there when it went in the envelope.

Q. Exhibit Number 4, could you tell the jury what that is?

[84] A. This is a small baggy that contains white powder substance that was retrieved from Brian Bartholomew that night.

Q. Is that the baggy that you retrieved from Brian?

A. Yes, it is.

Q. How do you know that?

A. It has my initials on the bag.

MR. ANDERSON: Your Honor, I think we'll offer these.

THE COURT: Why don't you have Mr. Harmon look at it.

MR. HARMON: I think we have no objection to this, on the basis it was found on Brian Bartholomew.

THE COURT: Okay, they're received.

(State's Exhibit Nos. 3 and 4 were received into evidence.)

Q. (BY MR. ANDERSON) After retrieving Exhibit Number 4 from Brian Bartholomew, what role did you play from that point?

A. At that time I assisted Brian up, and he stepped outside of the porch at the time, and I turned him over to – I didn't know if it was Deputy Jackson or Clete Carter who was was outside there to maintain custody of him. At that time the other individuals, both the Evans brothers and Mr. Callahan were being assisted, taken up and taken inside the trailer.

Q. Was Brian Bartholomew arrested or not?

A. He was not arrested.

[85] Q. Why was he put on the ground and handcuffed?

A. To at the time eliminate suspicion of him being a confidential informant, for his own safety.

Q. Was he then released later that night?

A. Yes, he was.

Q. Did you talk to him later that night about what had happened?

A. Yes, I did.

Q. Then after you turned his custody or care over to the other officer, what did you do?

A. I went inside to assist the other officers that were inside with the other three individuals.

Q. And did you locate any other evidence?

A. Yes. As I was going up the steps, on the porch there I noticed a plastic bag laying just outside the door that went into the trailer, in the porch area of the residence there.

Q. Did you take possession of that?

A. Yes, I did.

Q. Was it kept as evidence?

A. Yes, it was.

Q. Did you bring that with you to court today?

A. Yes. I did.

MR. ANDERSON: May he retrieve that, Your Honor?

THE COURT: He may.

MR. ANDERSON: May the witness open that package. [86] Your Honor?

THE COURT: He may.

Q. (BY MR. ANDERSON) Have you still got the scissors?

A. Yeah.

Q. I don't know if we want to trust him too long with those scissors.

THE COURT: So far he's okay.

THE WITNESS: I haven't hurt myself yet.

MR. ANDERSON: May I approach the witness?

THE COURT: You may.

Q. (BY MR. ANDERSON) Exhibit Number 5, could you tell the jury what that is, if you recognize it?

A. It's another brown manilla envelope that the Task Force uses to store their evidence in.

Q. What was it used for?

A. To store some evidence I found that night just outside on the porch.

Q. How do you know that?

A. It has my initials on the back.

Q. Exhibit Number 6, can you tell the jury what that is?

A. These were the plastic bags that were found inside the bundle that I found just outside the door.

Q. Do those bags have content?

A. Yeah. There's a white powder substance in them.

Q. How many bags are there?

[87] A. I believe there's four. It's hard to tell. There were four we found that night.

Q. And Exhibit Number 7?

A. This is plastic bags that were – that didn't contain anything, that were also found with the ones that contained the white powdery substance.

Q. So you're talking about Number 6? Number 7 was found with Number 6?

A. Yes, it was. They were all packaged together.

Q. How would you describe Number 7?

A. They're small, approximately one-half by 2-inch plastic baggies, Ziploc baggies.

Q. Are there any contents?

A. Not in these.

Q. Have you seen those type of baggies before?

A. Yes, I have.

Q. In what context?

A. The only thing I have ever seen these, myself, used for is packaging illegal drugs and narcotics.

Q. And how do you know Exhibit 6 and 7 are items that you found on the porch when you entered the residence?

A. I think my initials are in there somewhere. I seen them on one of these baggies. They were initialed and placed in the packet with my initials on there.

THE COURT: Are you offering those, Mr. Anderson?

[88] MR. ANDERSON: I am.

THE COURT: Any objection?

MR. HARMON: No, they were found on the porch.

THE COURT: They're received.

(State's Exhibit Nos. 5, 6 and 7 were received into evidence.)

Q. (BY MR. ANDERSON) I want to come back to Exhibit 4, 6 and 7. What did you do with the items after you took them into evidence?

A. They were later taken to the Crime Lab in Cedar City to be checked for controlled substances and fingerprints.

Q. Four, 6 and 7?

A. Yes.

Q. Did you see them again after that?

A. Today.

Q. You didn't pick them up from the Crime Lab?

A. I believe I did – not the ones that were sent up for fingerprints. The one package, I think it's number four. I brought back. The others were sent for fingerprint verification. I didn't pick those up.

Q. What did you do with Afton Callahan, Mick and Adam Evans?

A. They ware taken here and booked into jail.

Q. Was there any further search done of the premises, the house at the time?

[89] A. After they were advised of their Miranda warning Afton gave permission for us to search his residence.

Q. Were you involved in that search, or did other officers do that?

A. I was involved, but I didn't find anything there. The other officers found stuff there.

Q. How were they transported then, the three individuals, suspects? How were they transported?

A. Deputies from Millard County transported them out to the jail.

Q. Did you meet with them again out at the jail?

A. Yes, I did.

Q. Was there any conversation then between you and the individuals?

A. I talked with Afton. Again, I advised him, you know, he had been advised of his Miranda warning. He agreed to talk to me. He gave me a voluntary urine, what showed positive for meth. Also he showed me a welt on his arm. He said he had been using methamphetamine earlier that night and he still had the welt on his arm where he had used a needle to shoot up.

Q. Did he advice [sic] you that in fact he had been using meth with Adam and Mick that evening?

A. Yes, he did.

Q. Did you fill out what's called a booking sheet?

A. Yes. I did.

[90] Q. Where did you get that information from?

A. From the defendant, Callahan, when I was booking him in.

Q. Did he give you an address of where he lived?

A. Yes. It was Chalk Creek Trailer Court, number 9.

Q. Is that the trailer that you had just been involved in?

A. Yes, it was.

Q. Would you describe the interior of the trailer, as you recall?

A. As you enter in the doors that faces towards the south, you go in the door. The kitchen is on the right and then there is a living room, and you go down the hallway and there is, I believe, two beds rooms in the back towards the west end, with a bedroom on the very west end.

Q. With a kitchen and living room open?

A. Yes. There was like a snack bar or dividing bar or something between the kitchen and the living room.

Q. Did you speak with Adam Evans?

A. I didn't – if I did, it was minimal conversation with Adam.

Q. Do you recall seeing him, though?

A. I remember seeing him, but I didn't talk to him. I think Detective Jenkins talked to him.

Q. Would you describe his demeanor as far as you saw [91] him.

A. Umm, I'm just trying to remember.

Q. If you don't remember –

A. I don't recall exactly how it was that night.

Q. How about Mick Evans?

A. I didn't have much to do with Mick. The time I, saw him he was back in the holding cell there. He looked to be agitated to me.

Q. Was there furniture in the mobile home, the trailer?

A. As I recall, there were a couple beds in the bedroom I was in. I remember there was a couch, couple chairs in the living room, TV, I believe there was a table, small table in the kitchen. I think. I can't recall for sure.

Q. Did it took like it was occupied?

A. Yes.

Q. What was Afton Callahan's demeanor as you spoke with him?

A. I think it was more – It was remorseful that he had been caught, and he knew he had been caught. He showed a little remorse.

Q. Was he speaking coherently to you?

A. Yeah, he appeared to be talking normal. Wasn't slurred or anything like that. Appeared to be normal.

MR. ANDERSON: No other questions, Your Honor.

THE COURT: Okay, we'll take our afternoon recess at [92] this time. Members of the jury, again, the Court will remind you not to discuss the case amongst yourselves or anyone else, not to make up your mind about the guilt or innocence of the defendant until you've heard all of the evidence. I would also indicate to you if at any time during the trial you need to take a break, just raise your hand. Or if anytime you cannot hear a witness, raise your hands because you're the ones that need to hear and understand everything that goes on in the courtroom. So we'll be in recess until 3:30.

(Recess held.)

THE COURT: We'll return to the case of State versus Callahan. Mr. Callahan is present with his attorney, Mr. Harmon. Mr. Anderson is here representing the State of Utah. And the jury has returned to the jury box.

Mr. Anderson, did you have any more questions for Mr. Whatcott?

MR. ANDERSON: I have the tape now. We might as well identify it and play it at this point.

THE COURT: Okay, why don't you do it.

MR. ANDERSON: May I have the witness open the package?

THE COURT: You may.

Q. (BY MR. ANDERSON) Would you look at Exhibit Number 8 and tell me if you recognize it, and tell the jury what it is.

[93] A. It's a brown manila envelope the Task Forced used to store evidence in.

Q. And what did you use that to store?

A. The tape of the transaction recording from March 19.

Q. And Exhibit Number 9?

A. This would be the tape placed in the evidence packet.

Q. Tape of what?

A. The conversation of the transaction that took place that night at the Chalk Creek Trailer Park, number 9, the Callahan residence.

Q. How do you know that?

A. It's been placed in that evidence bag with my initials on it.

THE COURT: Any objection to its receipt. Mr. Harmon?

MR. HARMON: No.

THE COURT: It's received.

(State's Exhibit Nos. 8 and 9 Were received into evidence.)

MR. ANDERSON: Can we have the officer play that? Do you know how to run that machine?

THE WITNESS: Maybe Dwight can.

THE COURT. If anybody knows how to run the machine, they can turn it on and run it.

Do you have a microphone you can put by it?

(State's Exhibit Number played for the jury.)

[94] THE COURT: Any other questions. Mr. Anderson?

MR. ANDERSON: No. I don't believe so.

THE COURT: Mr. Harmon, cross-examination.

CROSS-EXAMINATION

BY MR. HARMON:

Q. Officer Whatcott, with regard to the tape we just heard, is that a fair representation of what you heard the evening of this incident?

A. Yes, it is.

Q. And I think you testified you're not able to distinguish the voices of any particular individual on that?

A. No, I'm not.

Q. I want to go back through your testimony some. You've indicated that you've been assigned to this drug Task Force for a one year period. Have you

had training on undercover work prior to being assigned to the Drug Task Force?

A. Yes. I've been to training on different things. and I have assisted since 1986 or '87. I worked with Captain Decker at the time I was assigned to the Millard/Juab County Task Force at the time. I've assisted him. And I've also worked with Captain John Kimball since the early nineties and stuff, on and off doing drug investigations here in Millard County.

[95] Q. Do you have written policies that you're to follow as you go about your drug investigations?

A. Yes.

Q. Do those cover your use of confidential informants?

A. Yes, they do.

Q. Do they cover the situation where the confidential informant may be under the influence of drugs or intoxicants?

A. I don't know the specific wording, but yeah, they are not allowed to use any illegal drugs.

Q. How can you determine if a confidential informant may be under the influence of drugs?

A. Well one of the best ways we have is through a urine test, a presumptive test is what we call it.

Q. In this case you were using Brian Bartholomew as a confidential informant. You've already

testified that when he comes to you and you're about to send him out, he admits to using alcohol?

A. That's correct.

Q. Did you give him a breath test?

A. Did not.

Q. Did you give him a urine test?

A. No, I did not.

Q. So you're not sure what his condition really was?

A. I knew he had been drinking, but I don't know anything about illegal drug use.

[96] Q. Did he tell you how much he had had to drink?

A. He told us that he and a friend had bought a 12 pack around 5:30, 6:00 o'clock when he got off work, and he had drank probably half of it himself.

Q. And he drives to meet you at the station; is that correct?

A. Yes.

Q. And was it obvious to you in driving there he probably was driving under the influence of intoxicants?

A. Without running a test on him, I couldn't tell you exactly what he was, but he had been drinking, yes.

Q. And when you left and sent him out to do the work, you didn't allow him to drive his car, did you?

A. No, we delivered him down there.

Q. Was there any particular reason for that?

A. Just precautionary, Just to make sure there wasn't any problem on the way there.

Q. Were you concerned that he may still be under the influence of intoxicants?

A. I don't think we were concerned about it. We just didn't want to take a chance at that time.

Q. And still he had never been – never had taken a breath test?

A. No.

Q. Hadn't taken a urine test?

[97] A. That night, no.

Q. And those facilities were there readily and available to you, weren't they?

A. There is an intoxilizer back in the jail, yes.

Q. And that could have easily been run that night on this informant; is that right?

A. It could have, yes.

Q. Now difficult is it to do the urine test?

A. It's not too difficult. You have to get a urine sample.

Q. And you have a portable kit where you can test it right there, immediately?

A. Yes.

Q. You talked about this confidential informant and said he came to you because he had been violating the drug laws.

A. That's correct.

Q. Is he a substantial or was he a substantial user of drugs?

A. I don't know what you call substantial. I don't know how much he was using.

Q. But he had been using drugs?

A. Yes.

Q. And he had a problem?

A. Yes, that's what he said.

Q. And he wanted to try to work that out with you?

[98] A. That's correct.

Q. He was hoping to avoid jail and other penalties?

A. That's one of the things we can maybe reduce, the jail sentence or whatever. But part of the deal is they have to plead to some of their charges that they have. We don't let them go completely free.

Q. You're aware that under the law the county attorney is the only one that can offer that type of amnesty?

A. That's correct.

Q. Was the county attorney ever contacted with regard to Brian Bartholomew?

A. Yes, he was.

Q. And did he outline what he was willing to do by way of a deal?

A. We talked it over and discussed the situation, yes.

Q. And did you come to a conclusion then as to what Brian Bartholomew would be offered?

A. We did, but exactly what the terms are, I don't recall.

Q. Did Brian ever talk with the county attorney, that you're aware of?

A. Not – I don't know. He may have.

Q. He just trusted you when you told him you would work it out?

A. Yes

[99] Q. As you began to work with Brian, did you give him any training on how he should conduct himself when he's doing his investigations?

A. Well he's agreed he's not to use any drugs, illegal drugs or anything. Once he has information, he contacts us, and then we go from there.

Q. This plan you had with Brian, he agreed to go in Afton Callahan's home; is that correct?

A. That's correct.

Q. Was there anyone there, that you know of, any officers that were close enough to see him actually enter the home?

A. You'll have to ask them. From where I was at I couldn't tell. I don't know where they were at for sure. I don't know if they saw him enter the residence.

Q. Did you?

A. No, I did not.

Q. You couldn't see who was there?

A. No.

Q. You could hear over the radio what was going on?

A. That's correct.

Q. You don't know if he was invited into the home or not, right?

A. Other than what I would hear on the tape, no.

Q. The home is located in what we call the Chalk Creek [100] Trailer Park. That's what it's been referred to?

A. That's correct.

Q. And Mr. Callahan had a trailer in space number 9?

A. Yes.

Q. Did you check with the owner of the trailer park to find out if that space was rented by Mr. Callahan?

A. I did not.

Q. Did anyone in this investigation check to find out it he rented the space?

A. I think the county attorney, Mr. Anderson, had talked with Allen Roper, who had just purchased the trailer court, about his living there or renting the space.

Q. You've described the trailer as being a single wide trailer and had a front porch on it of approximately eight by 10 feet?

A. That's correct.

Q. Did the porch have a roof over it?

A. I believe it does, yes.

Q. Is it a fully enclosed porch?

A. Yes, it is, and there's a door that leads to the outside.

Q. Once you get on the porch there's another door going into the trailer?

A. That's correct.

Q. Did you hear Mr. Bartholomew knock twice before he [101] went into the home?

A. Yes – well, I could hear the door open, and then a knock on a door.

Q. That's the squeaking sound we hear, as he opened the screen door and walked in?

A. Yes, to that porch area.

Q. And when he goes in there, then it's obvious to you there are other people inside the trailer?

A. Yes.

Q. And did that surprise you that there were other people there?

A. Brian had told me when he was there earlier that he had knew there was an Evans kid in the house, but he didn't know his first name.

Q. Did he say there were more than one Evans boy?

A. Not at the time, no.

Q. Did he indicate that Mr. Callahan's daughter may have been there?

A. He may have, yes. I don't recall for sure whether it was that time or when he went in the house the second time. I don't recall.

Q. Did you ever see the daughter at the trailer?

A. Yes.

Q. And where was she when you saw her?

A. She came up to the trailer after we were there and [102] had the subjects in custody at the time.

Q. Did you see her prior to that time?

A. No, I did not.

Q. At the time that she came to the trailer, do you recall where Mr. Bartholomew was?

A. He probably was standing outside of the porch area, I think.

Q. Did you ever have him wait on the porch, sit on the –

A. He may have, yes. He may have been sitting down on the steps somewhere there in the area. I don't know.

Q. Was there anybody in charge of him at the time?

A. Yeah, there were three other deputies there. Nathan Tingy, Bigg Jackson, and Clete Carter.

Q. Now, you've described the situation as you had your confidential informant, the Evans brothers and Mr. Callahan all laying down on the floor of the porch?

A. In that area, yes.

Q. And was there an officer in charge of each one of them?

A. When I first got there, Commander Pearson, Sheriff Gleave, and Detective Thomas and Jenkins were there. I got there, and commander Pearson and I remained with the four subjects there while the other three went through the trailer to secure and make sure there wasn't somebody else inside the [103] trailer at the time.

Q. Was there any particular reason that you went into the trailer, rather than wait for your confidential informant to come out and get what we call "the goods" from him and talk with him about what was happening?

A. Commander Pearson had decided on a plan with Brian. He had seen so much methamphetamine he didn't want any of it to walk out of there or any of it disposed of prior to our getting into the house after the CI had been there.

Q. Was there any attempt to get a search warrant?

A. No, there was not.

Q. Were you there when each of the Evans brothers were removed from laying down on the porch?

A. Yes, I was.

Q. Was the bag that you've referred to that contained the four bags of controlled substance underneath Mick Evans?

A. It was underneath one, I can't remember which one. There was one laying just outside the door. When they removed him it was underneath them.

Q. It wasn't this defendant?

A. No.

Q. It was under one of the Evans boys?

A. Yes.

Q. Is it true the Evans were each charged with this crime?

[104] A. That's correct.

Q. And Adam Evans has admitted that he had possession of the drugs?

A. He admitted to a possession I think, yes.

Q. His brother Mick has been determined to be incompetent is that correct?

A. That's correct.

Q. Was that consistent with how he was acting that night you saw him?

A. Well like I say, he seemed pretty agitated. I guess you could call it that. I don't know.

Q. Did you ever see any drugs or paraphernalia directly on the person of this defendant?

A. The urine sample I got tested positive for methamphetamine, and he showed me the welt on his arm where he had ingested methamphetamine that night.

Q. What I'm asking is did you ever see a bag of methamphetamine in his pocket?

A. No, I did not.

Q. Did you see anything under him?

A. No, I did not.

Q. Didn't see any paraphernalia on his person?

A. No, I did not.

Q. The drugs were found on the porch underneath one of the Evans boys?

[105] A. Yes.

Q. Except for the small baggy that was inside Brian Bartholomew's pocket?

A. Yes.

Q. What attempts were there made to secure this evidence and take care of the fingerprints that maybe on it?

A. When I recovered that evidence I went in there and we looked at it and immediately I had custody of it. The minute I took care of it, I kept it, held it up carefully and looked inside seeing what there was. There was what appeared to be methamphetamine in there. So it was immediately closed up and placed in a bag where it could be transported, kept in evidence and transported to the lab to be checked for controlled substance and fingerprints.

Q. Is it true that a plastic surface like that could be a good surface to get a good latent print on?

A. That's correct.

Q. But the lab could not find any?

A. No, they did not.

Q. At least none that could be used in court?

A. That's correct.

Q. So if the defendant did not touch that, somebody else had touched it, he lost the ability to prove that because the prints couldn't be found?

A. That's correct.

[106] Q. You indicated that Brian Bartholomew had a baggy in his change pocket?

A. Yes.

Q. Did that baggy look like it had been opened and some of the methamphetamine used from it?

A. There was empty space in there. I guess there could have been some in it earlier. It didn't look to me like it was open. I couldn't tell one way or the other.

Q. But when you asked Brian where it was, he told you it was in his change pocket?

A. That's correct.

Q. And you reached in with your hand and took it out?

A. That's correct.

Q. How did it get into Officer Pearson's hands?

A. When we were booking stuff he field tested the methamphetamine while I was there. He field tested with a NIC test and made sure it tested positive for methamphetamine. And than it was placed back in the evidence bag with myself and Commander Pearson.

Q. Who took Brian Bartholomew from the Callahan residence to the sheriff's office?

A. I don't recall who did that.

Q. When you got here, you met with him; is that correct?

A. I believe I brought him back here. Yeah, I met with him when I got back here.

[107] Q. Did you ask him to prepare a written statement as to what had happened?

A. No. I did not. I talked with him about what had happened.

Q. Did you make a tape recording of that conversation?

A. No I did not.

Q. Can you tell us about how long the whole incident took place, from the time that Brian Bartholomew walked up to the home until you're there and have the defendant lay on the floor?

A. I was just watching the clock when the tape was played and it's probably about 15 minutes, somewhere in that range.

Q. So that length of time we heard on that, that would be the whole thing?

A. Yes.

Q. Amongst the evidence that you brought in there was a bag that had four small bags in it. You indicated that was methamphetamine. Methamphetamine of a white color?

A. Yes.

Q. And those bags are clear?

A. Yes.

Q. And then there was another set of small bags, and you said there was no contraband in them, but they were in the large bag with these other four?

[108] A. Yeah, they were all together and rolled up in that one plastic bag.

Q. I noticed when I looked at that, these bags looked like they were black.

A. I believe that's fingerprint dust.

Q. Okay. So that's not the condition

A. No, that's not the condition they were in.

Q. That helps us out on that. There's no fingerprint dust like that on those other four bags. Do you know why?

A. You'll have to talk to the Crime Lab about that, I don't know why.

Q. All right. Would it be fair to say the residence was thoroughly searched?

A. Yes.

Q. And is it true, from your experience in working drug cases, that if a person distributes large quantities of methamphetamine and puts it in smaller bags they usually weigh it out?

A. That's correct.

Q. So that the buyer knows approximately what he's getting?

A. Yes.

Q. Was there any scales used or found in the Bartholomew residence that would show they had been weighing it out and putting it in bags?

[109] A. Bartholomew residence?

Q. In the Callahan residence.

A. We didn't find any scales, no.

Q. So apparently nothing had been packaged up in that residence?

A. I don't know.

Q. Is it true there were empty plastic bags, in similar size to those we've been talking about, found on the person of each of the Evans brothers?

A. I don't know on each one of them. I know there was another bag found, but I don't know on each one of them.

Q. Was another bag that you know about found on one of the Evans brothers?

A. Yes.

Q. Was there any bags like that found on Mr. Callahan?

A. No.

MR. HARMON: That's all we have, Your Honor.

THE COURT: Mr. Anderson, anything else?

MR. ANDERSON: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q. Officer, you indicated you spoke with Brian Bartholomew after you got back from the sheriff's office?

A. Yes.

[110] Q. Counsel asked you about that. What does Brian Bartholomew tell you?

A. He told me he had gone into –

MR. HARMON: Your Honor, we object to this being hearsay.

THE COURT: You brought it up, Mr. Harmon. You asked him whether it had been tape recorded.

MR. HARMON: The statement was made, "we have none of those." I think if they want to produce that, they should have had something like that.

THE COURT: Isn't it still hearsay?

MR. ANDERSON: It is, but counsel asked him questions about it, and I'm entitled to go into it.

THE COURT: He didn't ask him the content. He asked him whether he got a written statement or

the conversation was tape recorded. If he had gone into the content of it – clearly you can ask Mr. Bartholomew. You've subpoenaed him as a witness. Clearly it would be the best evidence as to what occurred. I'll sustain the objection.

MR. ANDERSON: I need to look at exhibits 4, 6 and 7. I think.

Q. (BY MR. ANDERSON) Look at Number 4 again. Tell me, Officer, have you seen controlled substance packaged for sale and distribution before?

A. Yes.

[111] Q. Would you just explain briefly, if you can, your experience in observing those types of packages.

A. Well they use several different types of packages. This is one particular type. Also they use some that are quite a bit smaller. A lot of times they'll take the end of a plastic sandwich bag, the very corner of it and put a little bit in there, weigh it, it's twisted off and then they use a lighter to melt the end to keep from spilling the contents. There is what we use to use quite a bit, paper bindles they would fold a certain way to keep the controlled substance in. Mostly any more they use plastic baggies.

Q. Similar to Exhibit Number 4?

A. Yes, uh-huh, this size and some smaller.

Q. Could you tell me whether or not what appears to be the amount of methamphetamine in that bag, would it have a value?

A. Yes, that would be approximately a gram. It looks like a gram of methamphetamine, and it sales [sic] for about usually $100.

Q. So the $100 for that amount of methamphetamine was consistent with your experience on the street?

A. Yes, it is.

Q. Exhibit Number 6, how many small baggies similar to Number 4 is in Exhibit Number 6? Can you tell?

MR. ANDERSON: Can he open that up, Your Honor?

[112] THE COURT: Yes.

THE WITNESS: There were four that were found that we sent to the lab. There were four different baggies that contained methamphetamine.

Q. (BY MR. ANDERSON) Are there still four in Exhibit Number 6?

A. It still looks like there's four in there. Can I open it?

THE COURT: You may.

THE WITNESS: There's four bags.

Q. (BY MR. ANDERSON) Are they similar to the baggy that is marked Exhibit Number 4?

A. Yes, they are.

Q. The same size? Would you compare them.

A. They're similar in size and some maybe just a little bigger, but they're consistent.

Q. What about the amount of material in each of the four baggies out of Exhibit Number 6? Is that a similar –

A. There's a couple of them similar and a couple that look like they have a little less, yes.

Q. Based upon your training and experience, what would be the value of each of the four baggies?

A. The bags with the similar amount of quantity inside of them would be the same value, approximately $100. The one that has a little less would be less, depending upon what the [113] weight was, a half a gram is about $50 worth.

Q. Approximately $350?

A. 350 to $400, depending upon the weight.

Q. And are the four baggies that came out of Exhibit Number 6, are they packaged then for individual distribution?

A. Yes, they are.

Q. Did you recognize any of the voices on the tape that you listened to?

A. I could recognize Bryan's, but the others I couldn't distinguish between which one was which.

Q. I need to have you explain maybe a little better, if you can, where on this 8 by 10 porch you found Exhibit Number 6, which is the four baggies we've talked about.

A. It was –

Q. If you could draw a picture of it, that would be fine.

A. Okay, this is the door coming into the porch area here, and then a door into the trailer is right here. There's a step right here that comes down onto this porch. I found it just right outside the door, in the middle of the doorway when you come out this door.

Q. So it was right next to the inner door that goes into the trailer?

A. Yes.

Q. Would you just put an X there.

[114] A. Right there.

Q. Was it underneath anything or underneath the step or –

A. No, it was laying right out in the open on the porch there, just barely outside the door off that step.

MR. ANDERSON: That's fine, that's all I have.

THE COURT: Mr. Harmon, anything else?

RECROSS-EXAMINATION

BY MR. HARMON:

Q. With regard to the location of the bag with the X there, I think you previously testified that that bag was under one of the Evans brothers?

A. Yes.

Q. Where he had been laying?

A. Yes.

Q. So where the X is where he had been laying down on the porch?

A. Yes.

Q. Was he laying face down?

A. Yes, he was face down.

Q. Where were his hands?

A. Towards the south, towards the outside door.

Q. Was he able to move his hands?

A. When I was there he was handcuffed behind the back.

[115] Q. How long had they been handcuffed; do you know?

A. Couple minutes or less.

Q. Do you know how long he had been laying on the porch?

A. Not very long. They didn't lay there over three minutes before they were picked up and taken inside.

Q. Do you recall where the other Evans brother was located on the porch?

A. They were all – Mr. Callahan was back towards the east, and the other Evans brother was just this side towards the door where the opening was.

Q. Would you come up and mark where they were?

A. The other officers can probably tell you better than I can for sure.

Q. Tell us what you recall.

THE COURT: Why don't you put a C for Callahan, E-1 for Evans and E-2 for Evans.

THE WITNESS: I can't remember, there was an Evans brother here and another, I believe. right in here.

Q. (BY MR. HARMON) Where was the drum set?

A. The drum set was right in this area here.

Q. Draw a circle there for us.

A. Okay.

Q. And was there a washer and dryer on that porch, too?

A. I believe there was. It was pretty crowded in there. I know that. But I can't recall all that was in there.

[116] Q. Would you say that by the time these four people were laying on the floor and you have half a dozen officers in there, this was really crowded?

A. It was close, yeah.

Q. Were you able to watch what your feet were doing as you were moving around the porch, whether you were maybe kicking things around or whatever was going on?

A. I don't think – we were watching hands at that time, not feet.

MR. HARMON: That's all I have.

THE COURT: Anything else, Mr. Anderson?

MR. ANDERSON: No, Your Honor.

THE COURT: You may step down.

MR. ANDERSON: Can we approach the bench, Your Honor?

THE COURT: Yes, why don't you approach.

(Bench conference held.)

THE COURT: Because we have certain witnesses here from out of town, we're going to take them out of order that what would be maybe the normal sequence of witnesses, just to accommodate them so they don't have to come back tomorrow. So Mr. Anderson, if you would call your next witness.

* * *

[139] (Evening recess held.)

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. AFTON D. CALLAHAN, Defendant.	)	CASE NO. 021700044

BEFORE THE HONORABLE DONALD J. EYRE, JR.
FOURTH DISTRICT COURT
765 SOUTH HIGHWAY 99
FILLMORE, UTAH 84631
REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL
VOLUME II
AUGUST 6, 2002

[2] **APPEARANCES**

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[4] **EXHIBITS**

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[5] Fillmore, Utah; 9:00 a.m.; August 6, 2002

PROCEEDINGS

THE COURT: Are we ready to proceed on the jury trial at this time?

MR. HARMON: Were ready, Your Honor.

THE COURT: Bring the jury in.

(The following proceedings were held in open Court in the presence of the jury.)

THE COURT: Well return to the case of State of Utah v. Afton Dale Callahan. Mr. Callahan is present with his attorney, Mr. Harmon. Mr. Anderson is here representing the State of Utah. The jury is in the jury box.

Mr. Anderson, you may call your next witness.

MR. ANDERSON: We call Brian Bartholomew.

THE COURT: Mr. Bartholomew, if you will come forward. Stand in front of the clerk. Raise your right hand and take on [sic] oath.

BRIAN BARTHOLOMEW

Called by the Plaintiff, having been duly

Sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the testimony you are about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

[6] THE WITNESS: I do.

THE COURT: Have a seat right up here.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Please state your full name for the Court, please.

A Brian James Bartholomew.

Q Hue [sic] old are you, Brian?

A I'm 24 years old.

Q And where do you live? Where is your home?

A Fillmore, Utah.

Q What do you do at the present time?

A I'm at a rehab center.

Q Where at?

A In Salt Lake City. It's called The Haven.

Q And could you explain that – what that program is, what it's for?

A It's a therapeutic program where drug related people go in and deal with their issues, talk about their issues, just a rehab center for people who have alcohol and drug problems.

Q And are you – is this voluntarily?

A Yes.

Q And is it because you've had a similar type of problem in the past?

[7] A Yes.

Q Do you know the defendant, Afton Dale Callahan?

A Yes, I do.

Q And I know it's not good manners to point, would you point him out in the courtroom, if he's here?

A He's right there on the end seat of the defendant's table.

MR. ANDERSON: May the record show –

THE COURT: The record may reflect he's identified the defendant.

Q (BY MR. ANDERSON:) How long have you known Mr. Callahan?

A I've heard of him my – I mean, being around Fillmore, I've heard of him pretty much my whole life. It's just been last couple of months I've really communicated with him.

Q Okay. Do you know officer Jeff Whatcott?

A Yes, I do.

Q Do you know what I mean by Task Force?

A Yeah.

Q Do you recall when you first become acquainted with Jeff Whatcott or the Task Force?

A Yes, I do.

Q When was that approximately, do you remember?

A First of January.

Q Of this year?

[8] A Yes, it was.

Q And could you explain to the jury, then, how it is that you came in contact with them?

A First of January, I got arrested for possession of meth, and I knew I had a drug problem, and I wanted to do something about it. And I figured this would be the best – or I asked a few deputies if there was anything I could do to help myself. And the next morning – I spent the night in jail, and the next morning I came in contact with Jeff Whatcott.

Q Did you agree to act as a confidential informant?

A Yes, I did.

Q What were some of the general instructions you were given then?

A Pretty much just do what they told me to do. I had to sign some papers to say I was a CO and –

Q A CI?

A A CI, yeah, sorry about that. And I just worked with the Task Force accordingly.

Q Were you to report information to them if you gained information about drug trafficking?

A Yes, I was.

Q Did you do that?

A Yes.

Q Did you receive any compensation, money payment, or [9] anything for your work as a confidential informant?

A No, I did not.

Q Did you – do you recall an incident in question here in court, the March 19th date? Do you recall that date?

A Yes, I do.

Q Do you recall what you did that day? Were you working or what were you doing?

A I was working. Yes, I was working.

Q What work – what kind of work were you doing?

A I was working for my brother. He's a cabinet builder.

Q Okay.

A Yeah.

Q And how did they – this matter come up, then, in your life?

A That day I was out getting a beverage and I ran into – is that the question you're asking?

Q Yes. Where did you go to get a drink?

A I was out at north Cheveron, and I happened to run into Mr. Callahan, and we talked for a little bit, and he mentioned that he was going up north – I presumed Salt Lake area, Provo, I'm not exactly sure – to buy some meth, and he'd be back later this evening or that evening, and after that I contacted Jeff Whatcott.

Q How did you contact Jeff Whatcott?

[10] A How?

Q Yes.

A I called him on my cell phone.

Q Do you know what time that would have been?

A I recall about 10:30, 11:00ish that morning.

Q Okay. Now, was anyone also with Mr. Callahan when you had this conversation about him going to pick up some meth?

A No.

Q Just you and he in the conversation?

A Yes.

Q You indicated that you went to get a drink. What kind of drink were you getting?

A I was just getting a fountain drink, a Pepsi.

Q Okay. What did you do then after having that conversation?

A After I contacted Mr. Whatcott, I went back to work for a few hours. Then as soon as 5:00 rolled around, I worked up till 5:00, and after that I found one of my friends, and we did go back to the store and grabbed another drink, bought a 12 pack of beer, and –

Q That would have been – when you got the beer, it would have been about what time?

A I believe it would have been right around 5:30, 6:00.

Q What did you go – what did you do?

[11] A I just went to the gas station, bought a 12 pack of beer, and headed up in the mountains.

Q Did you drink the beer with your friend?

A Yes, I did.

Q One friend, two friends?

A Just one other friend.

Q And how many beers did you drink?

A Probably between six and eight.

Q Okay. Did you see Mr. Callahan later?

A Yes, I did.

Q Do you remember about what time that was?

A It was probably around 8:30, 8:00, 8:30 probably.

Q And where did you see Mr. Callahan again?

A He was at his house.

Q And where was that at? Where's his house at?

A On 300 North, it's in the Chalk Creek Trailer Park, just down the street where I live, just right off Main Street there.

Q Do you remember the number of the trailer or anything?

A Yeah, number nine.

Q Had you been there before?

A Yes, I have.

Q Why did you go to Mr. Callahan's trailer?

A To see if he was back from Salt Lake to get some meth [12] from him.

Q Had you reported what you were going to do than to Jeff Whatcott?

A Yes. I informed him that when he got back from Salt Lake, I would give him a call.

Q Had you called somebody about – well, you went to the trailer to see if he had it, is that right?

A Yes.

Q And just tell me what happened at the trailer?

A Me and one of my friends walked in the trailer. I asked Mr. Callahan if he had any, and he says, yeah. And so –

Q Was there anyone else in the trailer with Mr. Callahan?

A Adam Evans was, and I believe his daughter was at that time.

Q Okay.

A I asked him if he had any. He mentioned that he did. He did show me the baggies.

Q What did he show you? Just explain what he showed you.

A He reached in the freezer, and he pulled out a bag that was rolled up with a bunch of baggies. I believe there was five or six other bags that had meth in them. Then there was a – but that was empty. They were all together rolled up [13] in a little baggy. He did show me them. I mentioned that I needed to go get some money, then I ran –

Q Was there a discussion about how much money you needed?

A Yeah. I asked him how much he would sell, and he says whatever you want. I did mention a hundred dollar bill which is a (tat, check) see know. And I told him I didn't have the money on me, I'd have to go round it up. So I left, ran across the street to my house. It's about 75, 100 yards away, and I tried

to call Jeff Whatcott. I couldn't get ahold of him, so I called Dwight Jenkins.

Q Who is Dwight Jenkins? Who did you understand him to be?

A Deputy Whatcott's partner.

Q Member of the Task Force?

A Yes.

Q Had you met Dwight before?

A Yes, I have.

Q And you spoken to him about being a CI?

A Yeah.

Q So he knew who you were?

A Yes, he was.

Q You were able to talk to Mr. Jenkins on the phone?

A Yeah, I did.

Q What did you tell Mr. Jenkins?

[14] A I told him that I had a deal going down, and that I just needed them to come over and set it up, and he did call Detective Whatcott, and detective Whatcott got ahold of me later, and he says, "I'll call you in 15 minutes. Just wait around." And I guess that was the time he was travelling from Holden to Fillmore. He mentioned when he said he would call

me that we'd hook up here in Fillmore. We met up on the west side of town, just down by the airport road. I told him that I was drinking, and I didn't know if I dared to drive. And, anyway, we met up. He brought me back here to the sheriff's office, and from there –

Q About what time do you think that was?

A It was between probably right around 9:00.

Q In the evening?

A Yes.

Q So you came with Jeff Whatcott out to the sheriff's office?

A Yes, I did.

Q Where was your friend?

A I dropped him off. I didn't want him to know about me being a narc, a CI.

Q Okay. So he wasn't with you when you met up with Jeff Whatcott?

A No, he was not.

Q What did you do then out here at the public safety [15] building with Jeff Whatcott?

A We sat around the desk. We talked. He knew I had been drinking. I mentioned it to him. He just made me drink five, or six, seven, eight cups of coffee. I'm not exactly sure. We did talk about just how –

what was going to go on, and mentioned how things were going to go down that night.

Q But do you remember what instructions he gave you about what you were to do or not do?

A He pretty much just kind of left it up to me. He did mention a few things, asked my [sic] if I was too drunk to do this.

Q Did you think you were?

A No, I don't believe so.

Q How long had it been since you drank?

A I quit about the time I contacted Dwight Jenkins, which was about 8:30.

Q And what was done to prepare you for the operation?

A As soon as all the other deputy sheriffs arrived, they bugged me. They put a little, like a pager, hooked me up to that. And just told me – or asked me how things was going to go on. And I mentioned that I was going to play the drums to give them a key to come in. They kind of left it up to me. Just because, I mean, they didn't know how things was going to go.

Q Did you have any controlled substances on your person at that time?

[16] A No, I did not.

Q Had they searched you?

A Yes, they did.

Q Were you given money?

A Yes. They took a Xeroxed copy of a hundred dollar bill and they gave me the hundred dollar bill. They asked me if he would suspect anything about a hundred dollar bill, and I said no. And they did give me that. They showed me the copy of the Xerox copy of the hundred dollar bill.

Q Did you have any other money of your own?

A No.

Q How long were you there in preparation for the operation before you left to go over to the trailer?

A It was a good two hours, so from 9:00 till probably 10:00 – 11:00, yeah, probably around 11:00.

Q Do you have any problem yourself then because of the beer that you drank earlier, did you have any problems, do you remember?

A No, I don't think I was having no problems.

Q You had – you had coffee?

A Yeah, I had a few cups of coffee.

Q Where [sic] you ever by yourself then during that two hour period of time?

A No, I was not.

Q You were just here in the Public Safety Building?

[17] A Yes.

Q What happened then after you prepared and it got to be about 11:00?

A By that time pretty much everybody from the Task Force was here. They had concerns about me driving, so I got in with them. They took me down the street to my house. I can see the trailer where Mr. Callahan lives from my house. And so I made them drive up the street above my house. I got out and then walked a couple hundred yards to Mr. Callahan's house.

Q Remember who you rode with in going over to the trailer park?

A I don't know. He wouldn't ever tell me his name that night. I think it's Marty.

Q Okay.

A It's the man back there with the beard, long hair. He gave me a ride over.

Q All right. What did you do then? You say you walked about 200 yards from where he dropped you off?

A 150, 200, yeah. Then I did knock on the door.

Q You were alone?

A Yes, I was.

Q Did you have any trouble walking over there?

A No, I did not.

Q What kind of weather was it?

[18] A It was dark. It was clear. It was good weather. I knocked on the door. His daughter then opened the door. She let me in. She then left the house.

Q Do you know what her name is or –

A I'm not sure what her name is.

Q How old was she, approximately?

A About 15.

Q Had you seen her there before?

A Yeah. She was there earlier in that day.

Q So you went to trailer number nine at the Chalk Creek Trailer Park?

A Yes.

Q Where you had been earlier that day?

A Yes.

Q You went in the house after you knocked? How – were you invited in or –

A Yeah.

Q – just kind of opened the door or what happened?

A Their daughter let me in.

Q Sorry.

A And I did walk in, and I seen another Evans kid sitting on the couch.

Q How many Evans boys were there?

A Two at that time. There was Adam and Nick Evans.

Q Did you know those two boys at the time?

[19] A I never associated with them. I knew who they were. One was in the back room when I walked in, and one was sitting on the couch, and Mr. Callahan was in the kitchen.

Q Go ahead and describe what happened then after you saw those three individuals in the trailer?

A I walked in, and I started just talking to them all. I carried on – the biggest conversation I carried on was with Nick Evans.

Q Do you remember what you were talking about?

A Yeah. I was talking about how I was just going to party it up. I'd been busted with drugs. I talked about my life. How I got in trouble just recently, and just talked about where I worked. He asked me about my brother. I mentioned my older brother, just talked about him. I talked to Adam a little bit. I can't remember what I talked to him about, wasn't too much. We sat there for ten minutes or so just talking, and I then –

Q Was Afton Callahan involved in this conversation too or just the Evans boys?

A We were all in the same room. It was like the living room, kitchen attached pretty much.

Q So Afton was listening to the conversation?

A Yes. Yes, he was. Uhm, I then asked Mr. Callahan if I could get any meth, and I pulled out a hundred dollar bill. And he walked over to the freezer, and he grabbed it out of [20] the fridge or the freezer.

Q Was it the same location then in the refrigerator where you had seen it earlier?

A Yes, it was.

Q That he had showed to you?

A Yes.

Q What did he do then when he got it out again?

A He pulled it out and he unravelled the plastic sack. He set them all down on the counter, and he let me choose, and I chose the biggest one. And I was like, "Right on." And I believe I heard that in the tape. I then put it in my change pocket in my pants, and we did sat around. I seen him roll up the bag. I believe he had it in his hand at the time.

Q When you say he, who are you –

A Mr. Callahan. I believe Mr. Callahan had it in his hand. I never seen him put it back in the freezer, then we proceeded towards the front porch, and –

Q What happened on the front porch? Do you remember who went out first?

A I was on my way out first.

Q And you say – who came out behind you?

A I believe it was Mr. Callahan, and Adam Evans.

Q Okay. What happened?

A I mentioned that we should play the drums and Afton Callahan said, "No, it's too late. We'll wake the neighbors." [21] And so I picked up the drumstick and gave it a little ding. I had a hard time getting out the door. The one screen door was kind of locked. The next thing I know all the deputies came barging in.

Q What happened to you at that point?

A They told everybody get down on the ground. I laid face first down on the ground. I believe it was Jeff Whatcott that handcuffed me. He asked me where the drugs were. I told him in my change pocket. At that time, I don't know who come running in the house I was looking down.

Q Did you see where Afton Callahan was?

A Yes.

Q Where was he in relation to you?

A He was kind of just kitty-corner, across the porch.

Q Standing?

A At that time he was laying down. When I looked back, him and Adam was laying on the ground.

Q Did you see where Nick was?

A I don't recall Nick, where he was.

Q Go ahead. I interrupted you. If you just finish. Then what happened, as you recall?

A They later just got everybody handcuffed. They stood me up. They set me outside while they did their search in the house. I believe I was with – under Billy Jackson's supervision. I'm not sure what was going on in the house.

[22] Q You didn't go back in the house?

A I did mention that I should go back in just so it doesn't look – so, I mean, just to save me, I guess. I didn't want it to look like I was setting them up. And so I did mention I needed to go back in the house, so I did go back in the house.

Q Billy Jackson go with you?

A Yes.

Q Go ahead, anything else you recall?

A I believe that's it. I mean they did the search in the house.

Q Where did you go then after you left the trailer park?

A Oh, came back here to the sheriff's office.

Q Did you go over what had happened inside the house with the officers?

A Yeah. We talked about it. They talked among themselves. A lot of times I just sat there and listened. We stayed here for two or three hours. I believe it was until about 4:30 in the morning. Finally, they released me.

Q Where did you go?

A I went back to my house.

MR. ANDERSON: May I approach the witness, Your Honor?

THE COURT: You may.

[23] Q. (BY MR. ANDERSON:) Let me have you look at Exhibit No. 6, Mr. Bartholomew, and can you just pull the contents out of that baggy. And just see if this – just tell me whether or not this is similar to what you saw at Afton Callahan's house.

A Yes, it is. It was in a little different baggies.

Q Just describe what you are looking at there?

A This is just a powder substance. It looks like meth.

Q Was it in little baggies like that when you saw it?

A Ziplock bags?

Q Yes.

A Yes, it was.

Q Look at Exhibit No. 4, and ask you if that looks familiar?

A Yeah. That's the bag it came in.

Q That – what came in the –

A The meth that I bought from Mr. Callahan. I believe that – yeah.

Q Is that about the amount that you purchased for a hundred dollars?

A Yes, it was. It looked pretty close.

Q Have you seen meth packaged like that before?

A Yeah.

Q Is that a common way to package meth –

A Yes.

Q – in your experience?

[24] A Yes. It does come in smaller baggies too.

Q But do you recall what Nick Evans or Adam Evans was doing when you were making that purchase from Afton Callahan

A I believe Adam was working on the furnace. He had the furnace face off. Nick was just sitting on the couch.

Q Where they could see what was happening?

A Yes.

Q Did they involve themselves in the conversation you had about selecting a baggy?

A No.

Q Anything that you can remember that either one said during that transaction?

A Not really. I'm not sure if it was during, but Nick just mentioned he didn't know I did meth, Nick Evans, and I don't know if it was before or during the purchase.

Q Do you have any knowledge about – to whether either one of them had meth on their person when you were there at the house, either earlier or around 11:00 when you went back?

A No. I never heard or seen anything like that.

Q They didn't talk to you, or show you anything they had on their person, anything of that nature?

A No.

Q Mr. Bartholomew, you had the hundred dollars in your pocket when you went in about 11 o'clock that night?

A Yes.

[25] Q Tell me again what you did with the hundred dollars?

A I did give it to Mr. Callahan. We were sitting at the counter, and he pulled it out, and we did make the switch, the transaction.

Q That kind of simultaneously, you got the baggy, you gave him the hundred dollars?

A Yeah. I set it down on the table as I was looking through the baggies. As soon as I picked my baggy, he collected everything, and from there I believe he just held it in his hand.

Q Did you see where he put it after he picked it up?

A The hundred dollars, no, I did not.

Q But he's the one that picked it up?

A Yes.

Q Did you – you didn't show it or give it to either of the Adams boys?

A No, I did not.

MR. ANDERSON: That's all I have. Thanks.

THE COURT: Okay, Mr. Harmon. Cross-examine.

CROSS-EXAMINATION

BY MR. HARMON:

Q Mr. Bartholomew, can you tell us what work you've done to prepare to come to Court to testify today?

A I've wrote down just that day, try to remember all [26] the things that happened that day.

Q When did you write that down?

A I made a lot of it last night. I didn't take very good notes. It was two and a half, three months ago. Other than that, that was it.

Q So in your preparation, have you talked with some of the deputy sheriffs in – the Task Force team members?

A Have I talked to some of them?

Q Yes.

A Yes. I have.

Q Since this incident, how many times have you talked with these people?

A Depends on who. It wasn't nothing – it was just like Dexter Anderson. He mentioned I should go to rehab just cause I do have a problem. He just told

me to meditate it, and try to remember as much as I could. He just give me advice to relax, and –

Q Have the officers gone over the facts of this case with you to help you remember?

A No. I don't recall, no.

Q Have you gone over the facts with Mr. Anderson to help you recall?

A Yes, I have.

Q How many times?

A Once.

[27] Q When was that?

A I believe it was the first time I got subpoenaed to court.

Q Okay. And how long ago was that?

A Two and a half months ago.

Q How much time did you spend together talking about the facts at that time?

A Ten minutes, fifteen minutes.

Q Okay. Have you talked about this case since that time with Mr. Anderson?

A I don't recall – this case, no.

Q Did you talk with him about it this morning?

A Yeah. He just mentioned the questions that he was going to ask me, just told me to relax up there.

Q And you went together and talked about the course of your testimony, didn't you?

A No.

Q Didn't you meet for 10 or 15 minutes this morning, at least, and talk about your testimony?

A I didn't mention anything about my testimony.

Q Okay. Now, you indicated to us that you are now living in The Haven Rehabilitation Center in Salt Lake, and you voluntarily agreed to go there. Are you there under an order of the court?

A Yes. Part of it has to do with that. It's either 21 [28] days in jail, my sentencing was, or to complete a rehab.

Q So you chose to go to rehab program?

A Yeah.

Q And what are you there for?

A Because I have a drug problem.

Q You have an alcohol problem in addition to drugs?

A Yes.

Q Are you there for both of them?

A Mostly alcohol.

Q In your mind, which was the most serious problem you suffer from, alcohol or drugs?

A Alcohol.

Q Have you used drugs frequently?

A Yes, I have.

Q What types of drugs have you used in the past?

A I've used just about everything. I've tried coke, meth, smoked marijuana. I did have acid, mushrooms.

Q When did you start using drugs? What was your age?

A Twenty-one, twenty, about then.

Q Weren't you using drugs in high school?

A No.

Q Didn't you cause your teacher some concern about your drug and alcohol use in high school?

A I got drunk once in high school.

Q So you waited until later on in life to start?

[29] A College.

Q And has the problem become very serious for you?

A Yes, it has.

Q In this case you were out doing your undercover work in an effort to make things better for you in your life, weren't you?

A Yes.

Q You were trying to make some kind of a deal with the officers?

A Yeah, I was trying to save myself.

Q And in doing that you knew that they expected you to do something for them, didn't you?

A Yeah.

Q If you had not turned in names to them, do you think they would have been willing to give you any kind of a deal?

A No.

Q So you had to turn in some names to them?

A Yes.

Q Now, you were acquainted with Afton Callahan, as you indicated to us his home is just several hundred yards away from where you live?

A That's correct.

Q And you've been in that home on occasions prior to this date in March; is that right?

A Mr. Callahan's home?

[30] Q Yes?

A Yes.

Q And, in fact, you've been in there making some romantic suggestions to his daughter; is that right?

A No, I did not.

Q To ask her to come over and sneak over to your house and go through your bedroom window?

A Not sneak over. I said if you want to come over –

MR. ANDERSON: Objection, Your Honor. I think it's beyond my direct examination. It's not material to the issues in this case. I don't know where counsel is going.

THE COURT: What do you claim for it?

MR. HARMON: I think that provides some of the motives for some of the testimony we have here today, Your Honor.

THE COURT: Well, he's denied it, so next question.

Q. (BY MR. HARMON:) Did Mr. Callahan have a conversation with you about your relationship with his daughter?

A He mentioned he doesn't want me around her.

Q Okay. And did you take that kindly?

A Well, I didn't think I was doing anything wrong.

Q Were you using drugs or alcohol when you had this – made these remarks to his daughter?

A Yes, I was. Yes.

Q Which, alcohol, drugs, or both?

[31] A I was – had alcohol in my system.

Q Okay. So you were intoxicated or just had alcohol?

A I just had a few beers.

Q Okay. Now, when you began to work on March the 19th, had you previously talked with the Task force officers about the possibility of setting up Afton Callahan?

A Yes. I have.

Q Did they suggest that you ought to see what you could do there?

A I mentioned it to them. I mentioned a few names, and I told them I didn't know if I could get into them or not. It would be hard, like, a shot in the dark. I did mention it to them.

Q Was this after you had the encounter with his daughter?

A This is way before.

Q Now, on the 19th you indicated you'd been at work, and left work, and gone out to the store to get a drink?

A That's correct.

Q Kind of on a break from work?

A Yeah.

Q While you were there, you saw Afton Callahan?

A Yes.

Q Did he come over talk with you, did you go over and talk with him?

[32] A We met each other right in front of the fountain drinks. I'd say he approached me. He was walking down the same aisle, so he approached me.

Q But did he intend to approach you? Were you there and he just said hello to you, then you started the conversation?

A Yeah. He walked down the hall, and we talked, and I believe – I don't know who started the conversation. I can't recall.

Q Did he have a drink in his hands when he was walking?

A No. He was coming down to get one, I believe.

Q Okay. So he was going to the pop machines, were you already there?

A Yes.

Q And when he got there then you started talking to him?

A Yes.

Q And did you ask him if you could get some drugs from him?

A I believe I did ask. I'm not exactly sure.

Q Okay. And you think that he mentioned that he was going north and he may be bringing some drugs back?

A He did mention that.

Q And did he say that you could come and buy any drugs from him?

[33] A He mentioned he would be back later, and told me I could stop by.

Q So did he tell you to stop by or did he tell you he may be back later?

A He'd be back later and stop by.

Q So he put you off. You asked him if you could get some drugs, and he really put you off; is that true?

A Yeah.

Q Just trying to, in some ways it may have been an attempt to just try and get rid of you; is that possible?

A No. I don't know. If he wanted to get rid of me, he could have come out and told me.

Q Well, he – were you and he on friendly terms at that time?

A Yes, I believe we were.

Q Had he already told you he didn't want you messing around with his daughter?

A I don't know about this daughter thing. It wasn't a big deal. It was like, we walked by the hall, and we bumped into each other, and he confronted me about it.

Q It was because of what you had said to her, isn't it?

A I don't recall what I told her.

Q Do you think she would remember?

A Yeah, probably.

Q But based on whatever was said, Mr. Callahan had a [34] conversation with you, and told you not to come around his daughter anymore?

A No, he did not.

Q Did he tell you not to come around the house anymore?

MR. ANDERSON: Your Honor, I'm going to object again. I think we've gone over and over it.

THE COURT: It's been asked and answered.

Q. (BY MR. HARMON:) On the 19th after you saw Mr. Callahan, then you indicate you went back to work?

A Yes.

Q Had you been drinking alcohol while you were at that work that day?

A No, I did not.

Q And you got off work around 9:00 and got with a friend and went out and bought some drinks; is that right?

A It was about 5:30, 6:00 when I did get off work that night.

Q So you worked until 5:30, 6:00?

A Yeah.

Q Had you talked with your friend about going out and getting some drinks?

A Yes.

Q Had you done that while you were there at work?

A No.

Q Did he work with you?

[35] A No.

Q Who was this friend?

A Mr. Nez.

Q Do you know his first name?

A Jared Nez.

Q Jared Nez. And where does he live?

A I'm not sure right now He used to live. – reside in Fillmore. He's moved from here. I haven't had no contact with him for, like, three months, so I have no idea.

Q And is he older or younger than you?

A He's older.

Q How much older?

A Half a year.

Q So he is close to your age?

A Yeah.

Q And then the two of you went – you say you went and got, as I took it, another pop to drink?

A No, I went and got a 12 pack of beer.

Q Did you get a pop to drink or did you just buy the beer?

A I always buy a pop when I buy some beer.

Q Okay. So you bought – was it a fountain drink?

A No. It was a bottle, I believe.

Q Okay. And then the beer that you bought was a 12 pack, was that cans or bottles?

[36] A Cans.

Q Do you remember what brand it was?

A Bud Light.

Q And then you and Jared went out. Were you driving while you were drinking?

A We went up and parked. I did drive on the way back down to town.

Q Were you in your car?

A Yes, I was.

Q What kind of car is that?

A It was a '98 Chevy pickup truck.

Q And you say you drank six to eight beers?

A Yeah.

Q In what timeframe were you drinking the beers?

A Probably between 5:30 and 8:30.

Q And then after that, you went to the Callahan home?

A Yes.

Q And did Jared go with you there?

A He did. He ran to another trailer. He come in for a brief second then he left.

Q Okay. And while you were there at the Callahan trailer, then you say that Afton was back?

A Yes.

Q And was Adam Evans there also?

A Yes.

[37] Q. Mr. Callahan's daughter was there?

A Yes.

Q And while you were there at the trailer, then you shot up methamphetamine, didn't you?

A I tasted it.

Q And where were you when you tasted it?

A Just in the bathroom.

Q And Afton Evans daughter saw you leaning on the floor in the act of taking care of the injection you just had; is that right?

A No.

Q What did she see you doing on the floor?

A Kneeling on the floor, I was never kneeling on the floor.

Q Kneeling in front of the sink?

A I was just tasting the meth.

Q And where did you get the meth you were tasting?

A From Mr. Callahan.

Q Where did he get that from?

A Out of a baggy out of his pocket.

Q Didn't come out of the fridge?

A I believe he grabbed it out of his bedroom, out of a jacket that was hanging up in the closet.

Q Are you sure about this?

A That I was kneeling? That the daughter seen –

[38] Q That Mr. Callahan got some bag out of a pocket in his bedroom?

A Yes.

You were really intoxicated at this time, weren't you?

A I had a few beers, six beers.

Q Six or eight beers. How many ounce beers were they?

A Twelve.

Q So you had had between 72 and 96 ounces of beer?

A Yeah, within three and a half hours.

Q And you were intoxicated?

A I could function just fine.

Q In the past when you've been drinking, didn't you usually feel like you could function fine?

A Yeah, but I can drink a case of beer, no problem.

Q In the past when you had been using methamphetamine or these other drugs, you thought you could get along just fine too, didn't you?

A Uh-huh (affirmative).

Q So this night, the same manner after you had consumed those six or eight beers, you thought you were getting along just fine?

A Yeah.

Q And you indicated that Adam Evans was there, is it possible that Adam hadn't – that you received any drugs from [39] Adam Evans?

A No.

Q No possibility there? Do you know that his testimony is directly contrary to yours?

MR. ANDERSON: Your Honor, I object. He hasn't testified.

THE COURT: Sustained.

Q. (BY MR. HARMON:) But you do indicate to us that you had used some methamphetamine?

A Yes.

Q At the house?

A I did.

Q Did you ever report that to the police?

A I mentioned – no, I did not.

Q Is this the first time they may be finding out about that?

A No. They did know about it, I believe. The first time I got subpoenaed I mentioned it.

Q And you'd also mentioned that – you had a lawyer that you were here with, and out loud you mentioned to him that you had been using methamphetamine and you were drunk?

MR. ANDERSON: Your Honor, I'm going to object to the use of the word use. He indicated that he tasted it.

THE COURT: Well, he said – he's also said – testified that he used it. So I don't know what the difference [40] between taste and use sounds like the same thing to me. Go ahead.

Q. (BY MR. HARMON:) Didn't you acknowledge that out loud where people could hear that?

A No, not out loud.

Q Was – you did acknowledge it in a voice that someone else could hear?

A I believe Jim Slavens was my attorney at the time. He did turn on me and use that – try to use that against me, but, yes, I did come out and tell him.

Q And there were other people around that heard that?

A No.

Q There may have been other people that heard it, you just don't know?

A No. I'm pretty sure there was nobody.

Q You intended that just to go to Mr. Slavens?

A Well, I asked him about what was going to go on today. He told me a few questions he was going to ask me.

Q And is that the time then the police learned that you had been using methamphetamine as well as drinking the beer the night that you were working for them?

A I mentioned that I did have drug problems, and I'm sure they knew.

Q When you agreed to work as a confidential informant, were you instructed that from that point on you had to be [41] clean, you couldn't use anymore drugs, or beer, or alcohol?

A Yes, I did.

Q They mentioned that to you, but you weren't able to control yourself; is that true?

A I do have a drug problem.

Q You are addicted?

A Yes.

Q To alcohol and beer, and that's a terrible problem for you, I take it?

A Uh-huh (affirmative).

Q You are trying to get some help so that you Will know how to handle that?

A Yep.

Q But at that time you hadn't had that help and, you did –

A No. I'm a weak person. I can't do it on my own.

Q It doesn't mean you are weak because you can't handle it. That's a powerful – these drugs have a powerful influence on you, don't they?

A Yes.

Q And your desire to get drugs is a powerful desire?

A Same for the alcohol.

Q And from what you have told us, you realize now you need some help and you are out there seeking that help?

A Yes.

[42] Q But on the 19th of March, you didn't have that help and you were using both of those drugs?

A Yes.

Q Alcohol and –

A. Yes, I was.

Q And is it possible that you confused Afton Evans with Adam – or Afton Callahan with Adam Evans?

A Would you – what did you say?

Q Is it possible when you were in the – let me rephrase that. Is it possible when you were in the Callahan trailer, that you confused Adam Evans with Afton Callahan?

A No. There's no confusion at all.

Q You are satisfied in your mind that Afton Evans is the one that's getting drugs out of the fridge and not Adam Evans?

MR. ANDERSON: I think he said Afton Evans.

MR. HARMON: Afton Callahan.

THE WITNESS: Yes, Afton Callahan was the person to get drugs out of the freezer.

Q. (BY MR. HARMON:) When you were at the Public Safety Building after you met Officer Whatcott – and, incidentally, did you drive your truck to meet Officer Whatcott?

A Yes, I followed him.

Q And had you told him or anyone about your use of alcohol that day?

[43] A Yes, I did.

Q And he still had you driving?

A He asked me if I was okay. I told him yes, just because in my sick brain I was.

Q What – and you came back to the station here, and they had you drink some coffee?

A Yes.

Q Was that – did anybody tell you that would perk you up, clear your mind?

A No. I know coffee does perk you up, and I don't like drinking coffee. They did mention I needed to drink coffee.

Q What, was that to make you a wide awake drunk or is that what –

MR. ANDERSON: I object –

THE WITNESS: I was not drunk.

MR. ANDERSON: I object to the question, Your Honor.

THE COURT: Sustained.

Q. (BY MR. HARMON:) Now, while you were here at the station in your preparations, you've indicated that they put a bug on you or a wire, where was that placed on your person?

A It was on my belt loop or on my belt on my pants, Levis.

Q And prior to putting that wire on you, had you been patted down?

A Yes, they searched me and my vehicle.

[44] Q And when they searched you, how did they do that?

A They checked my pockets, checked my socks. checked my hat. They checked my wallet, just patted me, did a full search on me.

Q In the search, was it a pat down search where they would pat you down on every pocket and all your pant legs?

A I did show them my pockets.

Q Did you pull your pockets out?

A I don't recall that night, but I have done it. I'm not sure if I did it that night I believe I did.

Q How about your change pocket?

A I don't recall.

Q Can you pull that out?

A No.

Q Do you recall anybody searching inside that change pocket?

A No.

Q After that – then was this done before you had the coffee or after?

A It was after. If was right before we – it was right around probably 10:45, I believe. It was right before we left.

Q Then you were driven back to the area of your house?

A Yes.

Q Did you see where officer Whatcott parked his car –

[45] A No, I did not.

Q – when you got there? And did you walk from your house over to the Callahan –

A Yeah.

Q – trailer? There was a driveway in the trailer park there that goes in the direction of your house, isn't there?

A Yes.

Q And did you walk down that driveway to the Callahan trailer?

A Yes, I did.

Q What was the light like?

A It was pretty dark down through there.

Q There's no lights in the trailer park that shined in that area?

A No. Just maybe front porch lights and lighting from the houses trailers.

Q No overhead lights in the park there?

A Not that I can recall.

Q And as you walked toward the Callahan trailer, did you hear or see their Rottweiler dog?

A Yes.

Q Where was it?

A It was on the east side of the trailer.

Q Were you friends with that dog?

A Never bit me when I petted it, so I guess so.

[46] Q Did it bark at you as you came down the street that night?

A No.

Q And you went to the trailer, on the front of the trailer there's been talk about a porch that's built there. Could you describe this porch for us?

A It's enclosed. It's made out of plywood. It's got a front door on it. Inside it's got a drum set and it had a dryer on it.

Q Was there much room inside that porch after the drum set and dryer had been put in there?

A There's not a whole lot of room.

Q And when you went to the trailer, did you knock on the door that goes into the porch?

A Yes, I did.

Q Okay. And then did you knock again on the door going into the trailer?

A Yeah.

Q I'd like you to think about that, think about what we heard on the tape. It's my recollection, we listened to the tape, you could hear a squeak before the knock and we only hear one knock. Is there a chance that you opened the door on the trailer on the porch and walked in without knocking?

A There could be a chance. I thought – I believed I knocked, but I guess what it says on the tape, I knocked only [47] once on the one door

Q When does the trailer door or the – excuse me, the porch door, does it squeak?

A I couldn't tell you that.

Q Is there a fastener on that?

A Yes.

Q And the Callahan's use this porch as an area where they want to enclose and keep things safe and protected; is that right?

A Yeah, I would say.

Q The drum set that's there is an important thing to them, isn't it?

A Yeah. I guess if you play drums.

Q They don't want people coming in there and stealing it and carrying it off?

MR. ANDERSON: I object, Your Honor, I don't think this witness knows what's in the Callahan's – what their purpose is.

THE COURT: Sustained. He can describe what's present, but he doesn't know what their intentions are.

Q. (BY MR. HARMON:) When you mentioned that the porch is built out of plywood; is that correct?

A Yes.

Q And then the walls of the porch are built out of plywood too, is that also correct?

[48] A I believe on the outside

Q And how high do they go, just that plywood go on the porch?

A Just up to the roof of the trailer.

Q So you really can't see any – the porch from outside?

A Can't see in the porch from outside.

Q Yes, that's because the walls are made of this plywood?

A Yeah.

Q Is the door a full sized door?

A Yes.

Q And it's – is it solid wood?

A I don't know about solid wood, but it's made out of wood.

Q Doesn't have a window in it?

A No.

Q And it's possible that when you went up there you just unlatched that door or unfastened it and walked in?

A Could be possible.

Q And then you may have knocked on the door going into the front room of the trailer?

A I don't recall if I knocked on the outside door or the door to go into the trailer.

Q Were you in the act of reaching down to get the [49] handle on the door to the living room of the trailer when the door opened?

A I don't recall.

Q Is that possible?

A Yeah. I guess it is possible.

Q The door opened and who met you at the door?

A Afton's daughter.

Q What was she doing?

A She left as soon as I walked in.

Q So she was opening the door to leave, would that be fair to say?

A Well, I knocked on the door, and she answered it, and she – maybe she was leaving. I'm not sure.

Q Did she say anything to you?

A I don't recall.

Q Anyway, she left?

A Yes.

Q And you then went in the trailer, you've indicated to us that there were three people inside the trailer?

A Yes, that's correct.

Q And there were the two Evans brothers and Mr. Callahan?

A Yes.

Q And you kind of described Nick Evans was sitting on the couch. Did he stay on the couch the whole time?

[50] A I recall, yes, until – I don't know what he did after I walked out on the front porch. I'm not sure if he was sitting on the couch the whole time.

Q Could you describe for us what kind of condition he was in?

A He seemed fine to me. He talked to me. We carried on a conversation for a little while, so I think he was – his condition was fine.

Q He's the one that you talked with most; is that correct?

A Nick, yes.

Q We know that he's in the state hospital now, did he –

MR. ANDERSON: Your Honor, I object. Your Honor, I don't think that's relevant.

THE COURT: Overruled. What he knows.

Q. (BY MR. HARMON:) Do you know that he's in the state hospital now?

A I've heard. I didn't know he was.

Q I was just wondering if he showed any of the signs that caused him to be placed there that night while you were visiting with him?

A I have no idea what signs those are.

Q Did he appear to be intoxicated in any manner?

A He may have been. He was sitting on the couch. I [51] have no idea.

Q Did he nod off sleeping from time to time?

A No.

Q Did he seem to be alert and know what was going on?

A Yes.

Q While you were there, then, you saw Adam Evans also?

A Yes.

Q And you finished your conversation with Nick Evans, and then you say something about getting drugs, do you remember what the words were that you used?

A I'm not exactly sure. I walked up to Mr. Callahan, and I did mention I had had a hundred dollar bill, and mentioned – asked him where it's at – or I'm not sure exactly.

Q Okay. Was Adam Evans there also?

A He was in the living room. He wasn't right there.

Q And did you see – was Afton Evans in the area of his fish tank?

A Afton Evans?

Q Afton Callahan. Excuse me. I keep making that mistake.

A Yes, he was.

Q And that's in the living room?

A That's on the sink bar that divides the kitchen and the living room, yes.

[52] Q And he was on the living room side tending the fish?

A I believe he was trying to hook the light up or something. I'm not sure.

Q Is it possible that Adam Evans went into the kitchen at that time?

A No.

Q Where was Adam Evans then?

A He was in the living room, I believe, all the time.

Q Was he by his brother?

A No. He was walking around.

Q And you indicated that you got a hundred dollars out and put it on the table?

A Yes.

Q Was it a table or the kitchen counter?

A It was the kitchen counter.

Q Was this on the opposite side of the fish tank?

A I don't recall. I believe it was. I don't recall where the fish tank was. I think it was on the same side as the fish tank. I don't recall though.

Q Did you see who picked up the hundred dollars?

A Yes. Afton Callahan did.

Q You're sure it wasn't Adam Evans?

A Yes.

Q You don't recall Adam Evans picking it up, handing it to Mr. Callahan, and saying, "Here's the hundred dollars I owe [53] you"?

A I don't recall any of that.

Q Is it possibility that it did happen that way?

A No.

Q You are fairly confident of that?

A I'm pretty confident. We set it down. We made the exchange, and I was there the whole time.

Q And then you got the small baggy of drugs that we've talked about?

A Yes.

Q And did you weigh it, or test it or did it look like it was a gram of drugs to you?

A I just looked at it and figured it was good enough.

Q Did it appear to be a gram to you?

A Yeah, it looks like a gram to me.

Q The reason I ask you is the state criminologist has testified that when he weighed it out, it was about a half a gram. Have you had enough experience buying methamphetamine that you can tell one gram from a half a gram?

A No, I could not. They come in different baggies. They come in different sizes. So I couldn't really tell you if – I mean, what a gram looks like. I can't honestly tell you if it was close to a gram or not.

Q Is it possible that your judgment with the quantity – as to the quantity of the drugs was affected by [54] the alcohol and drugs that were in your system?

A No.

Q You then went out on the porch. You described to us that you went out first, and then Mr. Callahan came out, and Adam Evans came out?

A Yes, I believe that's how the order went.

Q You're not sure if Nick Evans came out or not?

A I'm not positive about that.

Q And that you tried to go outside the front door on the porch?

A Yeah.

Q And you weren't able to get out; is that right?

A Yeah, that little latch was latched. I couldn't get out.

Q Did anybody try to help you open that up?

A No. As soon as I tried to get out, the door come swinging open. That's when all the deputies ran in.

Q And you told Officer Whatcott that the drugs were in your change pocket; is that right?

A Yes.

Q And when did you put them in your change pocket?

A As soon as I got them from – bought them from Afton Callahan.

Q Now, when you reported to the Task Force your drug activity, that Afton Evans was one of the target persons, did [55] you also – Afton Callahan was one of the persons you may be able to do something with, did you also talk with them about Adam Evans?

A To the Task Force?

Q Yes.

A No.

Q Did you feel that you were committed to use the name of Afton Callahan in this, even though Adam Evans was there?

A Yeah. He had the drugs, so I felt that his name was – I mentioned it, yes.

Q So you continued to follow up with Afton Callahan?

A Yes.

Q Never mentioned Adam Evans?

A I believe I mentioned it, but I don't remember to – well, yes, I do remember I mentioned it.

Q You indicated to us that you placed a second call to Officer Whatcott and this was, I take it, somewhere around 8:00 in the evening when you reported to him that you had been back to the Callahan residence and you can do the deal?

A Yes.

Q When you'd been back to the Callahan residence, you seen Adam Evans there?

A Yes.

Q And you got some methamphetamine then?

A No. I did not.

[56] Q You used some?

A I think that's when I tried it, so, yes.

Q Can you tell us from your own experience what its like? What it does to you when you use methamphetamine in combination with alcohol?

A Alcohol is a downer, and meth just brought me back up. I think for me I don't know how scientifically they put it, but for me just made me more alert.

Q Have you noticed any confusion in your thinking when you are using methamphetamine?

A No.

Q Notice confusion in your thinking when you use alcohol?

A Yeah, when I pass out.

Q Before that?

A No.

Q After you had been placed on the floor, you mentioned that you were laid down on the dirt. Was it the porch floor?

A Yes.

Q And that's the plywood floor?

A Yes.

Q Were there any rugs or anything that you were laying on too?

A No.

Q Did you see where the bag that contained the smaller [57] bags was placed at that time?

A I didn't see where it was. Last time it seen it, it was in Mr. Callahan's hand.

Q Okay. You don't know if Mr. Callahan did anything with it or not?

A I believe he held it in his hand, because it was shortly after that I was talking to him and we made the deal, transfer of money, and we walked out on the porch. And he followed me out, so I don't believe he had a chance to do anything with it.

Q So whoever had that bag in their hand at that time is the one that went out on the porch with it, is that your testimony?

A Yes.

Q And your best judgment is it was Afton Callahan?

A Yes, I'm pretty sure.

MR. HARMON: That's all I have.

THE COURT: Mr. Anderson, anything else?

MR. ANDERSON: Yes, Your Honor, if I could.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q Brian, you indicated you went to high school. Did you finish?

A Yes, I did.

[58] Q Do you recall how well you did in high school?

A I was an honor student. I was on the National Honors Society. I had a 3.8 GPA, I believe. I was pretty good student, I believe.

Q Good. Did you participate in any sports or extracurricular activities?

A Yeah. I was very active in sports, football, baseball, basketball. I was also very religious in the church.

Q You attended church when you were in high school?

A Yes, I did.

Q How much did you play football? Were you first string, second string, third string like me, or what?

A I was first string. Starting out my sophomore year all the way up to my senior year, I played first string.

Q What position did you play?

A Line backer, wide receiver, safety.

Q How well did the team do those years?

A We did took state when I was a senior.

Q What did you do then after you graduated from high school? Did you go to school after that?

A Yeah, I stuck around here, got a job working for the BLM for the summer. I then went to Cedar City, SUU to start college, and –

Q Did you finish some years at Cedar City?

[59] A Yeah. I got two years complete.

Q Okay. Apparently you came back to Fillmore to work for your brother?

A Yeah. Every summer I'd come back because my job for the BLM brought me back here.

Q Okay. So you worked for the BLM before you worked for your brother?

A Yeah.

Q What kind of work did you do before the BLM?

A I was a firefighter, wildland firefighter.

Q Do you have actual experience fighting fires?

A Yes, about three and a half years.

Q You indicated that when you first went to Afton Callahan's house, and after you went back to

see if he brought any back about 8:00, something like that, that you tasted it. What were you tasting?

A Meth.

Q And how do you taste meth? You need to educate us a little bit.

A I just smelled it, and then just tasted it with my finger, put it on my tongue.

Q Put a little on your finger or something, like you would sugar?

A Yeah.

Q Did you take enough for it to be a hit, anything of [60] that nature?

A I don't believe so.

Q How would you usually take meth?

A I'd smoke it or snort it.

Q How much meth do you have to have to smoke it or snort it.

A I'm not sure it's a good little bit to get a good high.

Q Is tasting it a way you would take it if you were going to get high?

A Personally, no.

Q So you just tasted it by putting it in your mouth?

A Yes.

Q Why were you doing that?

A Just because that's something I've always done when I bought it, is just to taste it.

Q Why would you do that when you are going to buy it?

A Just to see if it's good stuff.

Q It's just a test?

A Yeah.

Q That's what you were doing?

A Yes.

Q Did Afton offer to let you use a free line or anything?

A No.

[61] Q You didn't use a free line?

A No.

Q So then you told him you'd have to go find the money?

A Yes, I did.

MR. ANDERSON: I believe that's all the I have, Your Honor.

THE COURT: Anything else, Mr. Harmon.

MR. HARMON: I think it would probably be repetitive, Your Honor.

THE COURT: You may step down. Thank you. Mr. Bartholomew.

MR. ANDERSON: Your Honor, can he be excused? He needs to get back to his program.

THE COURT: Any reason why Mr. Bartholomew shouldn't be excused from his subpoena?

MR. HARMON: I think we may want to keep him here. your Honor. We may want to call him.

THE COURT: Okay. You are not released, Mr. Bartholomew. Next witness, Mr. Anderson, or would this be an appropriate time to take our morning recess?

MR. ANDERSON: It would, Your Honor. Let's have our morning recess at this point in time. We'll be in recess for ten minutes. We'll reassemble at 10:40.

(A recess was taken.)

(The following proceedings were held in open [62] Court in the presence of the jury:)

THE COURT: We'll return to the case. Mr. Callahan is present with counsel. Mr. Anderson is present. The jury is in the jury box. You may call your next witness, Mr. Anderson.

MR. ANDERSON: Dwight Jenkins.

THE COURT: Come forward, Mr. Jenkins. Raise your right hand and take an oath.

DWIGHT JENKINS

Called by the Plaintiff, having been duly

Sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the testimony you are about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE COURT. Have a seat.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q State your full name for the Court, please.

A Dwight Lee Jenkins.

Q And what is your occupation?

A I'm a detective with the Central Utah Narcotics Task [63] Force.

Q How long have you been a member of the Task Force?

A Almost four years full time.

Q Do you have other prior law enforcement experience?

A Yes, I do.

Q Could you tell the jury what that has been?

A I have been a deputy for the sheriff. County Sheriff's Office a number of years prior to coming to the Task Force. I believe it was 12. I was police chief over in Monroe for four and a half years. Prior to that, I was a deputy sheriff for San Diego County.

Q What training or schooling have you had for your profession?

A After the academy, of course, in California, I had additional training at the academy in Utah, and then met a minimum number of hours yearly in the State of Utah to meet POST requirements. I've gone well beyond those hours almost every year in training of various types.

Q Are you a certified category one peace officer?

A I am.

Q Have you had any special training or experience in the duty of enforcing anti drug laws –

A I have.

Q – for the State of Utah?

A I have.

[64] Q Just tell us what your experience has been?

A Experience and training?

Q Yes.

A Well, like I said. I've been a member of the Task Force for almost four years. I personally purchased drugs from suspects. I have worked CIs, confidential informants. I have written numerous subpoenas on cases. I have participated in all aspects of drug enforcement, I think, with the Task Force. I've trained – my training include – some of them are with the DEA. I've been to the DEA drug school. I've been to Quantico to the meth lab school; on two occasions, one for the meth lab, one is for officer safety, numerous other schools I could go on and on.

Q Are you familiar then with the street business, I suppose, of buying and selling narcotics, illegal narcotics on the street?

A I am.

Q Are you familiar with the amounts that are distributed and the price that it goes for on the street and so forth?

A Yes.

Q Do you know confidential informant Brian Bartholomew?

A I do.

Q Do you recall when it is you first met him?

A Not exactly. It's been a few months ago, though.

[65] Q What were the circumstances, if you recall?

A Brian had got into some trouble here in Millard County, I believe, it was. Deputy Whatcott initially spoke with him, and then I came to know him from that.

Q Do you recall when this particular matter that we've been discussing in Court yesterday and today first came to your attention?

A I believe it was on that day, that very day that it occurred, Detective Whatcott told me he received information from Mr. Bartholomew, that a gentleman by the name of Afton Callahan at the time had been in contact with him, and could possibly purchase some drugs from him later.

Q Had you heard the name or had any connection or dealing then with Afton Callahan prior to that time?

A I don't think he had mentioned the name to me. I don't recall the name up to that time. He may have mentioned it to one of the other detectives.

Q After Officer Whatcott had advised you of the information, what did you do or what was your next role or contact?

A At that time it was to wait and see if the informant could actually purchase some drugs later in the day. I believe that's what Officer Whatcott told me, that he would contact us later.

Q Did that happen?

[66] A Yes, it did.

Q Just tell the jury what happened as you recall?

A I received a page from Mr. Bartholomew, and I think at was around 8:00 in the evening. I returned the call and spoke with him on the phone. Mr. Bartholomew told me that he had a deal going on with Afton Callahan and we needed to prepare for that.

Q But what did you tell Mr. Bartholomew?

A I said that was fine. I would get ahold of Detective Whatcott because he was much closer than I was. I live in Sevier County, and he would meet with him, and I would get there as soon as I could.

Q Did you, in fact, do that?

A Yes, I did.

Q Where did you meet?

A I met at this facility, the sheriff's office.

Q Do you know about what time that was?

A I got here shortly after 9:00.

Q Who was here?

A Detective Whatcott, Mr. Bartholomew, I believe there was a deputy from Millard County, and – I don't recall which one.

Q The other members of the Task Force, other than Mr. Whatcott, were they there before you got there?

A They arrived after I got there.

[67] Q Just tell the jury then, if you recall, after you got here, about 9:00, what did you do? What did you observe?

A I spoke with Mr. Bartholomew. I asked him the general questions about what he had seen earlier in the day. He told us he had been there at the Callahan residence.

Q Did you observe Mr. Bartholomew's demeanor his physical condition?

A I did.

Q Would you describe what you noticed or what you saw about Mr. Bartholomew?

A I saw that he was – looked to me that he may have had something to drink earlier that day. And he had spoken to me about that, that he had been drinking. His eyes were somewhat bloodshot, so I questioned that. And he told me about the drinking earlier in the day, that he had had a few beers after work. And I spoke with him, talked to him, we had a conversation for quite a while.

He appeared alert. He was able to relate to me the same story about Mr. Callahan that he had related earlier on the phone. It was very close to what he had told me originally, so I knew he was alert,

knew what was going on, and could remember what had happened at the Callahan residence because that was the second time I had heard it, and it was accurate from the first time I heard it.

Q And what was Mr. Bartholomew telling you about what [68] had taken place earlier?

A He'd contacted Mr. Callahan and there were drugs at the Callahan residence, and that he could purchase approximately a gram of methamphetamine for a hundred dollars.

Q Is that basically what he told you on the telephone?

A Yes, it is.

Q I forgot to ask you if you had any experience in dealing with people who, in your job as law enforcement, dealing with people who have been drinking, had any experience in that area of the law?

A Yes, I have.

Q Would you maybe just kind of summarize that for the jury?

A Well, when I was working on the road, working as deputy for Sevier County for 10 or 12 years, I guess it was, I arrested numerous DUIs. I had been involved with people who were intoxicated on the street, in homes, had to have communications many times with people who had been under the influence. I've seen it numerous times.

Q Using your experience in comparing Mr. Bartholomew, how would you describe his condition as far as whether or not he was under the influence, whether he was drunk, what was your opinion?

A He wasn't drunk. I didn't feel like he was in a position to be compromised – or to compromise going over and [69] actually purchasing the drugs. I thought he was capable of performing the task at hand, and I didn't feel there was a problem.

Q If you would have felt there was a problem because of his drinking, what would you have done?

A We wouldn't have allowed him to go forward.

Q Was anything done then to try to help improve what condition Mr. Bartholomew was in?

A Someone gave him some coffee. He had, as I recall, three cups of coffee. It may have been more, may have been a little less. I don't know for sure. He drank the coffee.

Q Did he drink the coffee?

A He did, yes.

Q How long were you with him before the actual buy was starting?

A As I say, I arrived there shortly after 9:00. And there were times I stepped out of the office for various things a couple times, then I left for a while. Detective Thomas and I left for, oh, maybe a half an

hour, 40 minutes total that we were gone. And other than that, I was in there with him.

Q He didn't have anything available to drink then when you saw him?

A No. He didn't have anything to drink other than the coffee.

[70] Q Was there any drugs available to him during that period of time?

A No.

Q What was done as you recall to prepare him for the controlled buy?

A First of all, we tried to get as much information about who was in the residence, how many people concerned about that.

Q Did he give you that information?

A Yes, he did.

Q What did he tell you?

A He said that Mr. Callahan was in the residence, and I believe he said at least one other person by the last name of Evans. I don't recall the first name he used.

Q Okay.

A And then he told us specifically where the residence was. We talked about that we would give him the money, that we would put the monitoring

device on him, that we would search him. We went through that procedure again and that's what we did do.

Q Was he searched?

A Yes, he was.

Q What did you do or what did you see happen as far as a search is concerned?

A I believe I searched his hat is all I searched. [71] Deputy Whatcott was searching his person, kind of one of those things two is a crowd.

Q Is this standard procedures in preparing a confidential informant for a controlled buy?

A Yes. We search all of our informants.

Q What's the purpose in doing that?

A To ensure they don't have any drugs or anything that could be taken into the residence or the location where the buy is going to go down.

Q Did you find anything on Mr. Bartholomew?

A No.

Q Had anything been missed in your opinion?

A I don't think so.

Q Are pockets searched?

A Yes, they are searched.

Q Do you recall, then, how you – did you go down to the residence, Afton Callahan's residence at Chalk Creek Trailer Park?

A Yes, I did.

Q What other officers went down as you recall?

A Myself, I was with Detective Thomas in his vehicle. Detective Whatcott was in his vehicle. Commander Pearson was in his along with, I think, Sheriff Gleave from Piute County, and –

Q Do you recall how Brian Bartholomew got down to the [72] scene?

A Yes. Detective Thomas and I transported him down there.

Q Okay. So he went down in your vehicle?

A Well, Detective Thomas's vehicle, and he was driving. I was a passenger with him.

Q So was Brian Bartholomew ever out of your sight or out of your control on the trip down to the trailer park?

A No.

Q Did you stop any place, do anything, get out?

A No.

Q Anything of that nature?

A No.

Q Did Brian Bartholomew get out, do anything, go in any place?

A No.

Q What did you do then when you arrived at the trailer park?

A We drove past it. He was kind of trying to give us directions, although we knew where it was at because Detective Thomas and I had prior – gone down there prior and surveilled it. But he was kind of saying go a little further, he didn't want to get dropped off right in front of the trailers, which I don't blame him. We weren't going to. We went down a little ways. He got out. We watched him as we walked along [73] the roadway up to the trailer.

Q Were you able to see him walk up to the trailer?

A To the edge of the trailer, then he went around to the south side of the trailer. We lost him at that point, lost visual contact with him, but we could hear him on the monitoring device.

Q Could you see the porch we've talked about?

A Not from that location. We did move after he went into the residence. Detective Thomas positioned his vehicle that we were, oh, 15 or 20 yards probably from the front of the residence. We could see the front of it.

Q Were you parked outside of the trailer park when you first let him out?

A When we first let him out, right.

Q Can you kind of tell us where that was at?

A It was just on the street north of the trailer park. I think it's Third North, and we were – we let him out on that street, just maybe east of the trailer park, a little bit east so he could walk back to it.

Q You could see him as he walked away from your car at that point?

A Yes, we could.

Q How fast did you see him walk?

A I saw him walk into the trailer park area and walk up towards the Callahan trailer, and then when he walked around [74] to the south side of it is when I couldn't see him anymore.

Q So the porch then on the south side, is that what you would say –

A Yes.

Q And then apparently Officer Thomas moved the vehicle inside the trailer park?

A Yes, he did.

Q Within 15, 20 yards of the trailer?

A That's my estimation.

Q Did you see the porch that we've talked about from that point?

A Oh, yes. We could see the front door to the porch. We could see the porch and the front of the trailer.

Q Were you able to overhear through the transmitter on Brian Bartholomew conversation?

A We monitored the conversation for a while then had to switch over to the other channels so that we could hear when Deputy Whatcott gave the go signal.

Q So if the receiver was in Deputy Whatcott's car how could you hear what was being said?

A All of our vehicles have radios in them and we can monitor the bug channel off those radio.

Q You were listening over your police radio?

A Uh-huh (affirmative).

Q Do you remember any particular thing that was said as [75] you monitored that conversation inside?

MR. HARMON: Your Honor, we'd object to that. We've had an opportunity to listen to the tape that was made. We think that's the best evidence.

THE COURT: Well, why don't you ask him if he was here present when the tape was played, and if he thinks there was anything that was not on that tape that he heard.

Q (BY MR. ANDERSON:) I'll withdraw the question. Can you tell the jury what instructions you had, then, as an officer, what – generally what the instructions were as the situation developed, what were you supposed to do and the other officers supposed to do?

A Our job was to get in as close as possible. We've spoken to Commander Pearson about this. We got into a position where we felt we would not be noticed, but where we could still see the front of the trailer, the porch area, the door to the porch, we'd be close so that we could enter the residence, that was the decision that the commander had made prior to going there.

Q And was there supposed to be a signal or a cue when you would go?

A There was. It was Detective Whatcott's responsibility to get that signal, hear it and then give us the okay to go in.

Q How long do you think you watched? After moving [76] inside the trailer park where you could see the porch. how long did you wait before you went in?

A We waited until we got the cue signal from Detective Whatcott. I suppose that was – we were there for several minutes, maybe eight to ten minutes at that position.

Q You heard the tape that we played yesterday, is that correct?

A Yes, I did.

Q Is that – does that comport with your recollection as to the amount of time that took place?

A Part of that time we were out on the street, obviously, when we first let him out. And then we came around to the side of the trailer park, and actually had a short conversation with Commander Pearson, and then we pulled up into that position. We looked the situation over for a minute or so and chose the best spot, pulled up into that position, and then watched from there.

Q Did you receive a signal from Officer Whatcott to move in?

A Yes, we did.

Q And how did you receive that signal or command? What did he say, hand signal, radio?

A No. It was radio signal.

Q Red flag or what?

A He vocalized it. He said, "It's okay to go," or, [77] "Go," something like that.

Q You were in Officer Thomas's car with him?

A Yes.

Q Just describe what you did?

A We were already stopped. We were parked, like I said, very close to the trailer. We had the view

of it, so we didn't have to move. We didn't have to move the vehicle. We just exited the vehicle, and went straight to the door of the trailer, the porch area.

Q Who got there first?

A Detective Thomas was actually in front of me.

Q Okay. And Just describe what happened?

A The door was kind of being jiggled at the time, like someone was trying to come out or coming out or whatever. So Detective Thomas just grabbed it and pushed it open. We went in and –

Q Who did you first see when you went in?

A I saw the informant first.

Q Pardon?

A The informant, Mr. Bartholomew.

Q Okay.

A I saw him first.

Q Go ahead and describe what you did and what you saw?

A Then I saw two male subjects, turned out to be Afton Callahan and – gosh, the Evans boy. It wasn't Nick, it was [78] the other one. I can't remember his first name.

Q Adam?

A Adam. Thank you. Slipped my mind, Adam Evans. They were all immediately put on the ground and –

Q Who else was inside the porch? I mean, you talked about Thomas going in first, and you, Brian Bartholomew was there, and the other two individuals Mr. Callahan, and Mr. Adam Evens?

A Right.

Q Was there other officers in the porch by then?

A We had them, I think we had them on the ground before anyone else, any of the other officers got in, and – I may be wrong. There might have been someone standing behind me that I didn't notice right there. I was more focussed [sic] on the individuals to make sure they didn't have weapons, couldn't hurt us.

Q Can you describe who you dealt with?

A Initially Detective Thomas and I were both dealing with Afton Callahan and Adam, and we got them on the ground. And then I noticed after we got them on the ground, I noticed that the door to the trailer was moving, and I could hear something and see it move. I thought I could see it move. And so I focussed [sic] on the door to the trailer, actually went inside the trailer. And at that time, the door opened and that was where Nick Evans was standing.

[79] Q What did you do?

A I pointed my gun at him and I told him to get down on the ground.

Q Did he respond?

A No. He – initially he stood there like he was in shock that we were there, which is understandable. I ordered him two or three times to get down. At that point, Detective Thomas and Sheriff Gleave from Piute County each grabbed an arm and just put him down to the ground.

Q Put Nick Evans on the ground?

A Yes.

Q When on the ground, where did you mean in relation to the porch and the doors and where other people were?

A Out on the porch near where Adam Evans and Afton Callahan were. He stepped – as he opened the door, he stepped in the doorway of the trailer, and the porch, and so he was brought down just onto the porch near the doorway.

Q Did you see anything on the porch near where Nick Evans was put down?

A Yes, I did.

Q Would you tell the jury what that was?

A Prior to me opening the door even, I noticed some baggies on the – plastic baggies on the ground right in front of the doorway area.

Q Again, when you say ground, you're talking about [80] what?

A The porch, I'm sorry.

Q The porch?

A Yes. On the porch, next to where we had the other two gentlemen on the ground already.

Q And in relation to the door, where was the baggies?

A At the door of the trailer?

Q Yes. The inside door?

A The inside door. It was just – It was very close. I didn't measure or anything, but it was right in front of the door. I mean, not right at the door, but maybe just a couple feet away from the door. Like I say, near where we put the two gentlemen on the ground.

Q Did you see anything thrown there? Did you see Nick throw it there or anyone put it there?

A Nick didn't throw it there. He could not have done that. He was still inside the trailer with the door shut. He couldn't have put it there. I did not see who did put it there.

Q Was it moved or picked it up by anyone?

A It was later.

Q Later?

A Picked up by, I believe, Detective Whatcott picked it up.

Q Okay.

[81] A I think it was.

MR. ANDERSON: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (BY MR. ANDERSON:) I want you to look at Exhibit No. 6, and you may take the contents out, and ask you if you recognize that or not?

A It looks similar to what I saw on the ground by the door.

Q Okay. So if you just put it back in that baggy with the sticker Exhibit No. 6 on it. Did you examine it later? I don't know whether you did or not.

A I saw the baggies later.

Q Well, I'm just asking you to look at Exhibit No. 6 like this as I hold it in my hand, is that similar to what you saw laying on the porch?

A I believe so.

Q It wasn't a lot larger or a lot smaller, anything of that –

A No. No.

Q What did you do then after seeing Nick come out and having – pointing your gun at him, having him get on the floor with the help of two other officers, what was your next role?

A Detective Thomas and I then shortly thereafter we had [82] more officers come in, obviously, on the porch in assisting us. We then went into the house or the trailer to see if there were any other subjects, make sure no one was in there with weapons, we couldn't get hurt, that type of thing. He and I, and I believe it was Sheriff Gleave from Piute County went in with us, and we looked through the trailer for other suspects.

Q Were any of the individuals advised of their Miranda rights?

A They were. After we had done that, Commander Pearson had all of them come into the trader. They were standing basically in this kitchen area of the trailer, and he gave them their Miranda rights, and then asked each one of them specifically if they understood them, and they each said yes.

Q And was there any discussion about searching the trailer?

A Yes. He asked whose trailer it was. I believe he asked whose trailer it was and Afton said it was his. And he said, "Can we search your trailer?" And he said and I think he said were there anymore drugs or paraphernalia that type of thing. And Mr. Callahan said. "No, there's not any more drugs here. You can search if you want," something to that effect.

Q Did you participate in that search?

A I did.

Q Just describe what you did?

[83] A I searched part of the living room area. I believe I was in the first bedroom, the small bedroom just off the living room, closest one to the living room, and searched part of it, searched a closet area there in the hallway.

Q Did you find anything significant there?

A No.

Q Did you later?

A No.

Q Did you search other areas of the house?

A I believe those are the only areas I searched.

Q Did you find any syringes?

A Oh, gosh. That's right. That reminded me. I searched the kitchen area. I searched part of the kitchen area.

Q What happened?

A Gosh, I –

Q That's a tough job being up there. I've been up there myself.

A Yeah. You forget some things, I guess. Anyway, I was searching part of the kitchen area. After I finished those other areas I just told you about, and the – during that process, Deputy Jackson from the Millard County Sheriff's Office came in and said that

he had spoken with the daughter outside – Afton Callahan's daughter, I believe her name is Sarah, and she had said that there were syringes in the [84] kitchen area in some Glad Bags. And so I walked out with the deputy and we again spoke to her, and I asked her if there are syringes in there. She said, "Yeah, my dad keeps the syringes inside a bunch of Glad Bags."

The way she explained it, the way I perceived it, were a box of Glad sandwich bags, and inside there somewhere would be some syringes. I remember seeing a bag of Glad Bags or at least plastic bags. I went back into the residence and to the cupboard where I seen, but hadn't quite gotten on to the search, and I pulled the box, I believe it was Glad sandwich bags down, and I just put my hand inside the box, pushed around numerous plastic baggies. It was almost a full box, and I just squoze it kind of lightly. I didn't want to get stuck if there were needles in there. I carefully squoze. I felt something hard. I pulled it open and filtered through it and found several syringes.

Q Did you bring those with you to Court today?

A Yes. They are in the evidence.

Q What did you do with them after you found them?

A The items were placed into an evidence bag where they were signed and sealed by myself and

Commander Pearson, and then taken and placed into the evidence locker.

Q That's where they've been until you brought them to court?

A That's correct.

[85] MR. ANDERSON: Could the officer get those?

THE COURT: He may.

MR. ANDERSON: Can I approach this witness, Your Honor?

THE COURT: You may.

MR. ANDERSON: I guess we need the find the scissors again. Can we have the bag opened by the officer?

THE COURT: You may.

Q. (BY MR. ANDERSON:) Are the syringes in there?

A Pardon me?

(Counsel confers off the record.)

MR. ANDERSON: Can I have these marked, Your Honor?

THE COURT: You may.

Q. (BY MR. ANDERSON:) Let's go through this. Exhibit No. 15, a tag has been put on there. Just tell the jury and the record what that is?

A This is an evidence envelope that we use at the Task Force for putting our evidence in and sealing it.

Q What did you use that particular envelope for?

A This was for the box of Glad Bags and the syringes.

Q Did you put them in that bag as part of your investigation collection of evidence on the 19th of March?

A Commander Pearson actually put them in the bag and then our initials are on the bag.

Q Yours is?

[86] A Yes, mine and his.

Q Exhibit No. 16 would you describe that for the jury and the record?

A This is a box of Glad Bags, has sandwich bags, has numerous bags inside it, you can see, almost a full box. It appears to be the same one. I'm sure it was the same one. It was in the evidence bag.

Q Is this the box of Glad baggies you found in Afton Callahan's cupboard?

A Yes.

Q And Exhibit No. 17, would you describe that for the jury and the record.

A A plastic Glad bag or sandwich bag containing four syringes. These are the syringes that were inside the box of Glad Bags that I found in Mr. Callahan's residence.

MR. ANDERSON: We would offer 15, 16, and 17, Your Honor.

THE COURT: Any objection, Mr. Harmon?

MR. HARMON: No.

THE COURT: They are received.

(Plaintiff's Exhibit Nos. 15, 16, and 17 Were received into evidence.)

Q (BY MR. ANDERSON:) In your experience, Officer, are syringes used as part of drug culture?

A Yes, they are.

[87] Q And how are they used?

A To inject drugs into the system into the veins.

Q And would methamphetamine be something that could be injected with syringes?

A Absolutely.

Q With the syringes in Exhibit No. 17?

A Yes

Q And how is it injected? I mean, you need to explain that if you can, how that's done. How is powder injected?

A Well, they have to put a little bit of water with it, even heat it up sometimes, kind of – if – dissolves it, so it will dissolve it, then they use the syringe to pull it out of a spoon or whatever they've heated it up in, and then inject it into their vein.

Q What part of the body could they – would it be injected into?

A Wherever they can find a vein, arms, legs, in between toes. I've seen in the neck, where other people have actually shot people up for them, about anywhere you can find a vein.

MR. ANDERSON: I think that's all I have, Your Honor.

THE COURT: Mr. Harmon, cross-examine.

CROSS-EXAMINATION

BY MR. HARMON:

Q Officer Jenkins, you've mentioned that you went to [88] school at Quantico, Virginia to study about drug investigation; is that right?

A Specifically meth labs.

Q Okay. And was that at a school that was conducted by the FBI?

A DEA.

Q Do they use the same facilities in Quantico that the FBI uses?

A Could be some of the same facilities.

Q While you were there, did you also get training with regard to the effect of methamphetamine on the system?

A I don't think they covered that there at that school. It was strictly on meth labs.

Q Was that how meth labs work and where they are located that teach those things?

A Yeah. Among other things, yes.

Q Have you had training on the effects of various drugs on the system?

A Yes, I have.

Q And does that include alcohol and methamphetamine?

A Yes, it does.

Q Describe for us what effects the methamphetamine has on the human body?

A Well, it's a stimulant. It dilates the eyes, makes people more hyper. When I say stimulant, one of the names for [89] meth is speed, so it kind of speeds you up. You are more hyper, less attentive, less able to keep your attention on one thing for a

very long period of time, always moving about. Almost nervous looking. If you were to see someone who is high on it, they can't sit still. They are very nervous, very hyper, that's the way I explain.

Q You mentioned they have a hard time concentrating?

A They do on a task for very long. If they are on it, they will not be able to keep their attention on it for very long.

Q Are they confused?

A That part, I'm not sure.

Q In your work with this, most people – would you be familiar with prescribed methamphetamine that we take to lose weight; is that right?

A I don't know if they are prescribing that now or not. I know they prescribe amphetamine.

Q And in the past, that has been used for weight loss?

A Amphetamines?

Q Yes.

A That's my understanding, yes.

Q How about the effect of alcohol on the human body, what does that do?

A It's a depressant, and it does just that, it depresses the system. They become more sluggish,

you know, [90] more droopy, I guess more apt to, if they are really drunk, to nod off, fall asleep, even pass out. They get to that point. That's the extreme, of course.

Q What about combining the drugs with alcohol?

A Well, I – from my training, you can have an upswing and you can have a downswing. When they put more than one drug together, where there's alcohol and meth, or heroin and meth, or whatever, they can have an upswing and then a downswing, and then an upswing, and then a downswing. It can go in cycle if they are on a high. If they are not on a high, I'm not – sure it's not that way.

Q The combination of something that would – that causes some really serious problems in the human body – in other words, it's worse to use things in combination than it is to use them by themselves; is that true?

A That's my training, yes.

Q So if someone were to be using alcohol and then they use methamphetamine, they get in a worse condition then they were if they just used the alcohol?

A Where it's a stimulant and a depressant together, I'm not exactly sure if it makes it worst. It makes it so at one point they are more stimulated, other times they are more depressed. If it's a depressant, on a depressant I would say yes.

Q If someone were to be under the influence of alcohol, [91] could they sober up by taking methamphetamine?

A Yeah. No.

Q What would happen to them?

A I don't know that part. I couldn't answer that question.

Q On March the 19th, you indicated that you met with Brian Bartholomew prior to that time. Had you spent much time with him in the process of training him as a confidential informant?

A I had had several dealings with Brian prior to that.

Q What type of training did he receive as to how he was to act and what he was to do?

A I wouldn't even categorize it as training. What we do is we tell him to act as normal as possible, when he's talking to the people, dealing in a normal manner that he always has dealt. We leave that portion of it basically to the CIs so that he understands it, you know, to keep things as normal as possible.

We tell them that they can't buy any drugs without us. They can't – they can set the deal up and then contact us then we go from there. That's the big thing.

Q Are they instructed that they are not to use alcohol or drugs while they are working for you?

A The policy in the Task Force is they are not to using any control substances.

[92] Q How about alcohol?

A That's not one of them.

Q So you can have people that have become intoxicated and still allow them to go out?

A I didn't say that.

Q What's the policy? What instructions are they given with regard to use of alcohol then?

A I can't say that we specifically say anything about alcohol, but there are times when we've had people go into the bars, and obviously they will sit there and have a beer. We tell them they can't become intoxicated if we go do one of those specific type of things, but to sit and have a beer and talk to people, and try to arrange a deal, that can happen.

Q Is there any instructions given to them on the amount of alcohol that they can drink with regard to driving a vehicle?

A I don't know that we have had any driving vehicles, if they've been in a situation where they were drinking.

Q Okay. Would you use a confidential informant that would have had enough alcohol to where he would have been under the influence under the state law?

A Would I use one?

Q Yes.

A I would say it would determine – it would depend on the situation, you know, how long we waited to use them, the [93] CI, how long it had been since the CI drank because – from the time they stop drinking, they start coming down off the alcohol, how drunk they were to start with, how long we may have to wait, there's all kinds of issues.

Q And how do you determine that, if you have a person that's been drinking, say, six to eight cans of beer, do you check on a period of time they were drinking that?

A Well, we talked to them. We observe them. We've had enough training and been around people on drugs and alcohol to – I think I can tell if someone is drunk or not. And I wouldn't let anyone that I felt was drunk go do a deal. I would have to feel they were in control of their faculties and capable of doing it before I let them do it.

Q Now, you used the word drunk. I've used the word under the influence. Is there a difference?

A I think technically there is. I think you can be under the influence if you have a little bit of alcohol.

If you look at it that way, under the influence can mean that you drank some. Doesn't mean that you are impaired or that you are drunk, but that you've had some, in my mind.

Q Now, under Utah law we become impaired where we cannot drive a vehicle when our blood alcohol content is .08 or greater. Is a person at that level drunk?

A Well, the law says they are too intoxicated to drive. I think it depends on the person. I've seen a person that [94] could do all the field sobriety tests very well, and I've seen other people at .08 that can't hardly stand up. Those people I would say are drunk, the ones that can't stand up, the others maybe not.

Q But a .08 and above, its illegal to drive a vehicle; is that correct?

A That's correct.

Q And you wouldn't use a CI that's above .08 and have him drive a vehicle in his work, would you?

A I would not knowingly do that, no, let him drive if he was an .08.

Q Based on your training and experience, about how many cans of beer does it take to get a person to .08?

A What size of person. I mean, it depends on size. It depends on weight. There's a way to calculate it. I don't have that in front of me. There is a calculation for that.

Q In this matter, we're talking about you're using a – Brian Bartholomew is admitting six or eight cans of beer. In the work that you did with him on the evening of March the 19th, did you do any calculations to determine if he would be under the influence of alcohol?

A Did I do any calculations? No.

Q Yes.

A No.

Q We often use what they call field sobriety tests such [95] as having them walk a straight line, hold their arms out to balance, see if they can touch their nose with their finger, see it they can count, are you familiar with all those tests?

A I am.

Q Do they help you determine if a person is under the influence or intoxicated?

A They help, yes.

Q Did you do any of those with Brian Bartholomew?

A Not those specific ones, no.

Q Were there any tests given at all to Brian Bartholomew?

A Physical tests, no. Observation I did of him, which is part of it, yes.

Q And there were no chemical tests given to him?

A No.

Q When did you team that Brian had used methamphetamine earlier on March the 19th?

A Today in court.

Q Does that cause you any concern about what he may have been like at the time?

A No. I know what he was like at the time. I felt him to be capable, able to go forward and do the task at hand. I had been with him for two hours, and I know he hadn't had anything at that point. During that time, I felt he was good to go or I wouldn't have done it.

[96] Q Who made the final determination on whether or not you were going to go forward and use him?

A Final decision's always made by Commander Pearson.

Q And by the time, what time did you make that final determination?

A I would say it was just shortly before 11:00. Detective Thomas and I had been out surveilling the residence, and we were called back by Commander Pearson. I don't know the exact time we were called back, but, you know, 15, 20 to 11:00, maybe even closer than that. I'm not sure.

Q Did Commander Pearson talk with you to get your evaluation of Brian?

A Yes, we talked. He was there when I was at the office, and he came in before I went to do the surveillance, and we talked about it, talked about the situation, talked to Brian, was evaluating him a lot of the time just to make sure we were good to go.

Q By the time you are ready to make the final determination on going forward, how many officers were assembled there as part of the team to do the investigation?

A How many, let's, myself, Detective Whatcott, Detective Thomas, Commander Pearson, Sheriff Cleave, that's five. There were at least two Millard County deputies that assisted, and I think they were at least in and out of the office during that time. So at least seven, I don't know if [97] I'm missing anybody or not.

Q Would it be fair to say at that point that there had been a lot of effort, a lot of time, a lot of travel put in to get this operation going forward?

A Oh, yeah. There always is.

Q And it would have been a disappointment to say, "We're not going to do it. We'll try another day"?

A We've done that before many times.

Q But would have been a disappointment at that time?

A It doesn't bother me that way. If we can do the deal, we do it. If we don't, we don't, and we come back another day.

Q In the work that you've done with the Task Force over the last four years, has there ever been a time when you have sent in an undercover agent who is under the influence of intoxicants?

A Yes.

Q How many times has that happened?

A I can think of one other person at least that had been drinking. When you say under the influence, I'm just, in my mind, that has had something to drink.

Q Okay. Above .08 or greater?

A I don't know.

Q So this one may have had a drink, but you don't know how much?

[98] A Correct.

Q With Brian Bartholomew, you have an idea of how much, is that correct, six to eight beers?

A He told us at the time six.

Q Ordinarily would six beers be enough to make a person under the influence to where they cannot drive a car?

A It would probably be close. In his case, that could be close, but then there was quite a bit of time that elapsed before we actually went and did the buy.

Q Would it be also fair to say that you had testified numerous times that two cans of beer is enough to put someone over the legal limit?

A No, I have never testified to that to my knowledge.

Q Have you ever heard any other officers testify to that?

A Two cans, I don't think so. I don't think I've ever heard that in court.

Q Now, you indicated that when you went to the residence, you parked, let Brian off, that – did he identify to you where his family home was?

A At that time, no, he didn't.

Q Okay. Have you learned since where it is?

A Yes.

Q Was that the area that you let him off?

A Yes.

[99] Q And as you looked from his home down into the trailer park, was it light or dark?

A It was dark.

Q Very dark?

A Gosh, define very. It was dark. There was some lights around. I think there was some porch lights. There were lights from trailers, so you could see, you know, somewhat, but obviously not real clearly.

Q With regard to the porch that's on the Callahan residence, did it have any lights inside?

A Inside?

Q Inside the porch?

A There was light inside the porch, and I don't know if it was from a direct overhead light or if it was light coming from when we went in from the doorway in the windows that shown into that area.

Q Okay. Was it dark?

A No, not as I recall, it really wasn't. You could see pretty well.

Q And it's true that the walls of that porch are plywood that go front the floor to the ceiling?

A Yes, I believe so.

Q And so no light can come from the outside to those?

A Correct.

Q If there's light there, It's got to come through an [100] open door?

A Yeah. Well, I'm not sure. Like I said, I don't know if there was an overhead light in that room specifically or if the light was coming from the trailer into that room, but there was light.

Q Was there any particular reason that you didn't have Brian drive his car up to his home and then walk over?

A We're not going to take any chance, even if he had one or two beers, we probably wouldn't have let him drive. Just one of those things we're not going to take a chance on. We'll get him there, and under these circumstances we could do that and do it safely.

Q Prior to going there, had you thought about securing a search warrant for the residence?

A I can't remember if we discussed that or not.

Q Did you ever ask the Court for permission to use the radio transmitter that was placed on Brian?

A Did we ask the Court?

Q Yes.

MR. ANDERSON: I object, Your Honor. I don't think that's material or relevant. There's no requirement for that.

THE COURT: Sustained.

Q. (BY MR. HARMON:) As you arrived at the residence, you indicated that the door, the front door that went into the porch was fastened?

[101] A No, I didn't say that.

Q It was being jiggled?

A It was jiggling like someone was standing at the door opening it, or getting ready to open it, or just opening it at the time we got there. That's what it appeared to me to be.

Q You heard Brian's testimony today that he couldn't open the door?

A Okay. Yes, I did.

Q So it was fastened?

A It was fastened for him.

Q But you were able to then open the door and go in?

A Clark, Detective Thomas, Clark Thomas, was the one that actually opened the door.

Q What was the legal basis for you to enter the trailer at that time?

A I believe to secure the persons in the residence at that time. Because we had just purchased methamphetamine, we knew that there was a large quantity of methamphetamine, and we can secure that residence with those people, and either obtain a search warrant from that point or from permission to search.

Q Now, some of the factors you mentioned are that you knew there was a large quantity of methamphetamine, you knew that before Brian Bartholomew had gone into the residence around 11:00, didn't you?

[102] A He had told us he had seen the baggies of methamphetamine, yes.

Q And that would give you some basis to get a search warrant?

A Yes, very limited.

Q And you are saying he told you he had been there before and seen that?

A On that day, yes.

Q That would give you some basis to get a search warrant?

A That's the same thing, isn't it, that one time.

Q And the other factor was that you think that you just heard a buy?

A We did hear a buy.

Q What you heard is what we heard in court?

A Yeah.

Q On that broadcast?

A Yeah.

Q And with that, then, you entered the porch?

A Yes.

Q And there was no permission given to you by Mr. Callahan to do that?

A No, there was not.

Q In the time that you had been there observing the Callahan residence, did you ever see Sarah Callahan leave the [103] trailer?

A No, I did not.

Q As you went on the porch, you indicated you first saw Brian Bartholomew, and then there were two other individuals there?

A Yes.

Q Can you tell us now what order those people were in? We know now there was Adam Evans there and Afton Callahan who was behind Brian Bartholomew?

A Those two gentlemen you just mentioned.

Q You don't – you're not – you can't remember what order they were in?

A Detective Thomas was right in front of me when we initially went in, and then when I came around him, they were kind of standing side-by-side or basically shoulder-to-shoulder type thing.

Q As you recall the condition of that porch, would it be fair to say that the room was extremely limited there?

A It was limited.

Q The drum set that we're talking about has over – had a dozen drums; is that right?

A Could do. I didn't count them.

Q It takes a large portion of the porch?

A Actually, not that big an area. I was kind of surprised. It's not a big drum set. It was a rather small [104] set.

Q And then there was a washer or a drier [sic] on the porch also?

A I believe that was off to my left as I walked in, yeah.

Q Were there bags of things sitting on the porch in addition to those two items?

A Bags, uhm, I don't remember. I didn't see anything else in regards to bags, anyway.

Q And then as you were there, then you see Mr. Callahan, Adam Evans, and Brian Bartholomew placed on the floor. Are they asked to lay face down?

A Yes. I'm assisting Detective Thomas, and we're putting those subjects on the floor.

Q Did you ask them to lay down?

A Yes, we did.

Q Did they voluntarily do that?

A Yes, they did.

Q And you asked them to stay on their stomach?

A Yes.

Q Did they all do that?

A Yes, they did.

Q Now, during this process, you say that you looked and saw plastic bag –

A Yes.

[105] Q – on the floor. Had the individuals already been laid on the floor when you saw the plastic bag?

A Yes.

Q Did you see where the bag came from at all?

A No, I did not.

Q Now, as you think about the porch and the trailer, is there a small crack between the trailer and the porch?

A Where they meet?

Q Yes, where they meet?

A You know, it seems logical, but I can't say that I saw it. I don't recall.

Q Okay. Is it possible that because of the light you may not have seen that?

A I didn't see it for whatever reason. Like I say, I could see in the room. It was light enough to see well.

Q Was it light enough to read?

A I don't know. Definitely not without my glasses.

Q You indicated that you heard a noise on the – in the living room of the trailer, that door was moving, and you looked in and you saw Nick Evans?

A Actually, he opened the door, I just heard the knob and saw it moving, and the door jiggle, and then it came open. He was standing – he had opened it.

Q So there had been no light coming from the door of the living room into the porch area until he opened that door?

[106] A Unless there's cracks in the door around it, possibly could have been there. I don't know.

Q And as you talked with Nick Evans, he seemed confused about what was going on?

A No. He seemed, I think the term I would use was surprised. He was, you know, cops are here type thing. That's the look of being startled or surprised.

Q And when you asked him, gave him certain directions, he didn't follow those?

A First two times he did not, and then Detective Thomas and the sheriff from Piute County,

Sheriff Gleave, actually grabbed an arm each and put him to the ground.

Q Did they force him to the ground?

A No. It wasn't a force, just a direct him to the ground. And he did so without any violence or anything.

Q Where was he placed on the porch?

A Near the other two gentlemen, kind of over that baggy I had saw directly in front of the door, a little ways in front of the door to where he was laid down.

Q Was he laid down on top of that baggy then?

A I think the area was at least close to it.

Q Were you concerned that something may happen to the baggy then?

A No. Because they were putting his arms behind his back. He couldn't get to it or do anything with it. I knew [107] it would still be there when we got him up. We were more concerned with securing the suspects.

Q What was his demeanor at that time? Was he resisting their force?

A No. Actually, he wasn't. I had several dealings with him during that evening and from that point on he was not a problem, didn't resist, didn't give me any problems. I had good conversations with him.

Q You've indicated that later on in the evening then you saw the baggies that we talked about to Exhibit No. 6. Can you tell us what – where you were when that happened?

A I believe it was inside the trailer, Commander Pearson had been given them, or maybe it was Jeff that had them. I can't remember now, but I saw them at that point.

Q And was there any effort made at that time to secure that bag to preserve the fingerprints?

A Well, I didn't handle it. I think we kept that limited to – just the one or two officers were usually quite careful. What they did – I didn't handle it. What they did, I'm not sure.

Q You don't know how it got picked up from the floor?

A No, I didn't see them actually pick it up.

Q Whether there were more than one officer that handled the bag or not?

A I believe Deputy Whatcott was one. And whether [108] Commander Pearson actually handled it or not, I'm not sure

Q Now, you indicated that Mr. Callahan was asked for permission to search the trailer?

A Yes.

Q And he may have said, "Go ahead. There's no drugs here"?

A No, he did say that.

Q He did say, "Go ahead. There's no drugs here?"

A I think there were two questions involved, "Are there any drugs or anything like that in the house?"

He said, "No."

And then it was, "Can we search the residence?"

"Yes, you can."

Q Then the search was conducted and there were no other drugs found; is that true?

A Correct.

Q You indicated that you found in the Glad box four syringes?

A That's correct.

Q Were those syringes tested to see it they had ever been used to inject drugs?

A No.

Q Did they appear to have been used before?

A They appeared to be clean.

Q In your search of the trailer, did you find any other [109] syringes?

A Just on subjects in the trailer, I think.

Q And who was that?

A I believe one was found on Nick Evans and one was found on Adam Evans.

Q And what does that suggest to you about those two men with regard to drug use? That they may be using drugs?

A Definitely possible, yes.

Q There was nothing like that found on Adam Callahan or Afton Callahan, excuse me.

A Not to my knowledge, no.

Q The four syringes were in a plastic bag, was it one of the Glad bags?

A It looked like it's the same type of bag, I'm assuming it is.

Q Have you compared it carefully to see if it was a Glad bag?

A I looked at the bag itself, and I looked at the Glad bags. It looks the same.

Q Okay.

A Maybe it's a different brand. I don't know.

Q Was it tested?

A The bag?

Q Yes. To see if there was any residue?

A No. it was not.

[110] Q Any fingerprints attempted to be taken from that bag?

A Not to my knowledge, no.

Q Was that preserved for the purpose of fingerprinting?

A Well, it's in evidence, so technically I guess it has been preserved, but I don't think there's been any testing on that bag.

Q Now, we have talked about the syringes that you found, and you've described how they may be used to inject drugs, and you've indicated that in order for a drug like methamphetamine, which is, in this case, is in powder form, how that's converted to a liquid. And I think you said that sometimes that the powder is put in the spoon with the liquid and then heated up?

A Can be a spoon, whatever type of container so they can heat it a little bit.

Q Is that a customary practice?

A Well, it's definitely one way I've been told numerous times about. I'm sure there's other ways, but that is definitely one of them.

Q Have you seen or been involved with people who have been using drugs who have mixed their drugs in that manner?

A Yes, I have.

Q So you have had experience with it?

A Yes, I have.

Q Did you find anything like that in the Callahan [111] trailer?

A Spoons?

Q Anything that appeared to be heated?

A Not to my knowledge. Sometimes it shows up, sometimes it doesn't.

Q Now, you've indicated that areas that you searched. You told us that you searched the bedroom, one of the bedrooms. Did you go through all of the – everything and do your best job in searching there?

A There was the one other officer in that bedroom with me, so the areas I searched of that bedroom, I searched well, I think.

Q But nothing was found there?

A No.

Q There wasn't a bag of methamphetamine in a shirt pocket in that bedroom?

A I didn't find anything to that effect.

Q And to your knowledge, did any of the others find anything like that?

A No.

MR. HARMON: That's all I have.

THE COURT: Mr. Anderson, anything else?

MR. ANDERSON: Just a quick question, Your Honor.

THE COURT: Go ahead.

[112] **REDIRECT EXAMINATION**

BY MR. ANDERSON:

Q Officer, you are talking about searching the bedroom, did you determine where Afton Callahan slept in the room?

A Yes, I did.

Q Will you tell the jury what happened, how you determined that?

A In the living room, there's a couch, and then there's a wall normally. You put the couch against the wall. But the couch, I'm estimating, was two and a half, three feet away from the wall. Then between the back of the couch and the wall was what appeared to be a bed, blankets, or sleeping bag, that type of arrangement on the floor laid out in a bed form.

And then hanging over the end of the bed next to the wall were some clothes. There's some clothes hanging up in there on something. I can't even remember what it was. So, anyway, it appears that to me that someone was sleeping there. Afton said he did.

Q Afton Callahan said he slept there?

A That's what he told me, yes.

MR. ANDERSON: That's all I have. Thank you.

THE COURT: Anything else, Mr. Harmon?

MR. HARMON: Just a brief question.

RECROSS-EXAMINATION

[113] BY MR. HARMON.

Q Officer, were you assisted in searching the interior of the trailer by other officers?

A I was, yes.

Q And who were the others that did the search besides yourself?

A Those that I previously mentioned. I don't think the Millard County deputies were involved in the search, but the other officers, Commander Pearson, Detective Whatcott, Sheriff Gleave, Detective Thomas, and I searched. I don't know that there was anyone else.

Q Were you satisfied that these men knew what they were doing in searching?

A They were competent and do a good job at their work.

Q And be fair to say if there were drugs there they probably would have found them?

A Well, we found out there are times when we've missed them. We'd like to think that doesn't happen very often.

Q And there were no drugs found?

A No, there were none found.

THE COURT: Anything else, Mr. Anderson?

MR. ANDERSON: No, Your Honor.

THE COURT: Okay. Members of the jury, we're going to take our noon recess at this time. Again, the Court admonishes you not to discuss the case among yourselves or [114] with anyone else. Not to make up your mind as to the guilt or innocence of the defendant until you've heard all the evidence. We'll ask you to reconvene at 12:20, and we'll start taking – I mean 1:20. That would be a short lunch, wouldn't it? 1:20, and start taking evidence at 1:30. I'd ask counsel to see me at 1:15. We'll be in recess.

(Lunch recess taken.)

THE COURT: We'll return to the case of State of Utah v. Afton Callahan. Mr. Callahan is present with Mr. Harmon. Mr. Anderson is present. You may call your first witness.

MR. ANDERSON: Your Honor, we need to recall Dwight Jenkins, if we can. If I can reopen direct, there was a matter that I needed to ask him.

THE COURT: Okay. Officer Jenkins, if you would return to the witness stand. Remind you, you are still under oath.

REDIRECT EXAMINATION

BY MR. ANDERSON:

Q Officer. I believe you indicated that you saw Nick and Adam Evans out here at the Public Safety Building afterwards, after they had been brought out here?

A Yes, I had a conversation with them here.

Q And did you talk about what had taken place earlier at Afton Callahan's house?

[115] A I did.

Q Would you tell the Court what was said and by whom?

A I first spoke with –

MR. HARMON: Your Honor, I'd have to object now because this is outside the defendant's presence and would be hearsay.

THE COURT: Isn't it. Mr. Anderson?

MR. ANDERSON: Well, no. I think that counsel has already talked to the officer about conversations that he had with Nick and Adam Evans. That's all I'm doing.

THE COURT: Well, it's hearsay, though, isn't it? I mean –

MR. ANDERSON: Well, I don't think it is because –

THE COURT: What exception does it fall under?

MR. ANDERSON: That's part of the elements of the offenses are charged against Mr. Callahan. I mean, we have the burden of proof. I think it goes to the idea that Mr. Callahan was acting in concert with Adam and Nick Evans, and also that they were a party to the crime.

THE COURT: Anything else, Mr. Harmon?

MR. HARMON: I think with regard to Nick Evans, I'm not sure that any statements made by him would be admissible at this point since he's been determined to be incompetent.

THE COURT: It might go to the weight. I'm going to overrule the objection. Go ahead. If it's on the basis that [116] you're claiming that it's in furtherance of a joint criminal conduct, is that what you are –

MR. ANDERSON: Yes, Your Honor.

THE COURT: Go ahead.

Q. (BY MR. ANDERSON:) Go ahead and tell the jury, then, what was said by Nick or Adam about what had taken place at the house?

A I first spoke with Adam Evans here at the jail. At that time I was collecting a urine sample to be tested to see if it was positive for methamphetamine. He said that he would be, that he had used methamphetamine at Afton Callahan's trailer at (tat, check) Chop Creek Trailer Park earlier that evening. I then had a conversation with Nick, advised him I wanted a voluntary urine sample, which he provided. He also told me during the conversation that he had used methamphetamine at Afton Callahan's house earlier that evening.

Q And did they test positive?

A Yes, they did, both of them.

MR. ANDERSON: Thank you. That's all I have.

THE COURT: Anything else, Mr. Harmon?

RECROSS-EXAMINATION

BY MR. HARMON:

Q In your conversations, did they tell you where they [117] acquired the methamphetamine that they had used?

A No, they did not.

Q Did they tell you how they ingested the methamphetamine?

A I think they said they used a syringe, a needle, injected it. I believe both of them said that.

Q Did they tell you it was their father's needles that he used because he's a diabetic and he injects insulin?

A No.

Q Did they say that Afton Callahan was present?

A Yes, they did.

Q Did they say where they had ingested the methamphetamine?

A At his residence.

Q Did they say which room?

A I'm sorry?

Q Or who was present?

A They said that Afton was there, and they were both there, but they did not tell me which room exactly it was in. I probably didn't inquire.

Q From what they said, they just described the entire residence and not any particular area?

A They said they were in Afton's residence, and they used methamphetamine, and that Afton was there with them when they did so.

[118] Q But they didn't say that he was there and saw them doing it?

A They said that he was there with them when they did.

Q But that could mean that he's there in the trailer?

A No. That wasn't my understanding. I don't remember the exact wording, but my understanding was that he was right there when they did it.

Q We're not concerned about your understanding. Clearly you're a prejudicial witness. You're an officer. You're willing to let people with six beers drive on the street. What we need to know is what they really said.

A No. I'm not willing to let people with six beers – said I wasn't.

Q Well, what you heard them say was that they were at the home, wasn't it?

A No. I told you what I heard.

Q That they were at Afton Callahan's homes?

A At Afton Callahan's home, that he was there, and that they were using methamphetamine with him.

Q And when he said he was there, that meant going back to they were at his home?

A When they said that they were using methamphetamine with him, I believed that he was there in their presence with them using methamphetamine.

Q But they never said that?

[119] A That's what they told me.

Q They did not tell you that. You just said that they – you assumed –

MR. ANDERSON: Counsel, I –

THE COURT: Overruled – I mean, sustained. It's argumentative. He's asked and answered. Next question.

MR. HARMON: That's all the questions I have, Your Honor.

THE COURT: Anything else, Mr. Anderson?

MR. ANDERSON: No.

THE COURT: You may step down.

THE WITNESS: Thank you.

MR. ANDERSON: We'd like to call Clete Carter. If's a little out of order as far as my outline is concerned, but I think it fits in with where we're at.

THE COURT: Okay. Mr. Carter, come forward be sworn.

* * *

[123] CORDELL PEARSON

Called by the Plaintiff, having been duly Sworn, was examined and testified as follows:

THE CLERK: You do solemnly swear that the testimony [124] you are about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Have a seat.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Sir, would you state your full name for the Court.

A Yes. It's Cordell Pearson.

Q And could you tell us what your occupation is at the present time?

A I'm the commander of the Central Utah Narcotics Task Force.

Q And how long have you been the commander?

A Four years.

Q Have you had previous law enforcement experience?

A Yes, sir. I have.

Q Could you describe that to the jury, please, if you can?

A Yes, I will. I'm a retired police officer from the Las Vegas Metropolitan Police Department where I spent 17 years working undercover purchasing narcotics. For the last few years I was assigned to a Federal Task Force that was headed by the FBI. After I retired, I moved back to Piute [125] County where I was elected sheriff of Piute County. I was a sheriff for seven and a half years. I then took the job as commander of the Central Utah Narcotics Task Force.

Q And how did you become commander of the present Task Force?

A The job was offered to me and I took it.

Q So you retired and went back to work, is that it?

A Yes, sir. Never did retire, I just kind of switched jobs.

Q Apparently you've had a lot of experience then in controlled substance law enforcement?

A Yes, sir.

Q Has that been a chief assignments that you fulfilled?

A Yes, sir.

Q You indicated you been an undercover officer?

A Yes, sir.

Q For about ten years?

A No, over 17 years.

Q Okay. And where was that at?

A Nevada, and pretty much all over the western part of the United States.

Q Did you have any training at – formal training or is it just based on your experience that you –

A No, sir. I've been to – I can't tell you how many schools numerous schools, two or three DEA schools. I've [126] been lab certified two different times in my career. Just recently I attended lab schools in Salt Lake City that was put on by DEA. I attended several narcotics schools in California.

Q Let me move on, if I can. You've apparently been in the courtroom during other testimony in this particular case; is that correct? You've been listening to some of the other testimony?

A Oh, yes, sir.

Q Do you recall the incident yourself?

A Yes, sir. Yes, I do.

Q Were you involved?

A Yes, I was.

Q What role were you playing on March the 19th then?

A As the commander of the Task Force, I was called by Detective Whatcott and was advised – that was probably somewhere around 9:15 that night that we had a drug buy set up in Fillmore. At that time I contacted Sheriff Gleave. Sheriff Gleave and myself then proceeded to the Millard County Sheriff's Office where we met with Detective Whatcott, detective Jenkins, and Detective Thomas, along with the confidential informant.

Q Did you meet with the confidential informant?

A I spoke to him a little bit, yes.

Q And did you notice or take note of his demeanor, how [127] he was acting, his physical condition at the time?

A He acted fine to me. I had been advised by Detective Whatcott and Detective Jenkins that he had been drinking prior to them meeting with him around 9:00.

Q Was that a concern to you as commander of the operation?

A Not when I looked at him. It was when I first heard he had been drinking. It's always a concern. But once I talked to the confidential informant, I had no problem with him proceeding to do the narcotics transaction.

Q As commander did you feel he could perform the function or role that you intended for him to perform?

A Yes, sir, I did.

Q If he hadn't been in that condition or able to perform, in your opinion, what would you have done?

A I would have called it off and we would have went home.

Q Has that happened before?

A Yes, it has.

Q Did you know Brian Bartholomew prior to meeting him that night?

A I think I met Brian one other time.

Q Did you know he was operating as a confidential informant for the Task Force?

A Yes, sir, I did.

[128] Q Had you yourself then given him any instructions on how he was to conduct himself?

A Not really instructions, no. I think my two officers, Detective Whatcott and Jenkins – Detective Whatcott's informant, I think. It was Detective Whatcott informed him. I also reiterated the fact of what we expected of him what he could do and what he couldn't do.

Q Did you give him any further instructions at that night on the March 19th?

A No. I just talked to him about what was going to happen, how many people was in the residence, and he also told me the drugs that he had seen there earlier, and that he had talked to the defendant, Mr. Callahan, about purchasing some drugs on that evening.

Q Were you involved in the actual preparation of Brian Bartholomew to – involved in a searching of him?

A I was present when Detective Whatcott searched him, yes, but I did not search him myself, no.

Q What's the purpose of searching a confidential informant? What are you or your officers looking for when that's done and as part of the preparation?

A To make sure that the confidential informant has no contraband on him. We also check to see how much money he has on his person at that time. If confidential informants have the same denominations bills that we are going to give them, [129] we usually hold that money until after the transaction is done, so the money don't get mixed up and get confused.

Q Were you satisfied that Brian Bartholomew was clean of any controlled substance on his person before he went –

A Yes, I was.

Q Did you – do you have any knowledge about his being furnished money?

A Yes, I do.

Q Would you explain that to the jury?

A When a purchase of narcotic is being made by a confidential informant, we always ask them how much is the drugs going to cost. They usually tell us. Sometimes they don't know the exact denomination. It might be $30, $35. However, on this occasion, Mr. Bartholomew knew it was going to be $100 for one gram of methamphetamine. Prior to giving the confidential informant any currency from the Task Force, the bills or the currency are always xeroxed by the case agent, who in this case was Detective Whatcott.

Q Where did the money come from, the hundred dollar bill?

A It comes from the Central Utah Narcotics Task Force. We have a safe that has – we have money to purchase controlled substances.

MR. ANDERSON: Can I approach the witness, Your Honor?

[130] THE COURT: You may.

Q (BY MR. ANDERSON:) Would you look at Exhibit No. 2, and tell me if you recognize that exhibit?

A Yes, sir, I do.

Q How is it that you recognize it?

A It is a xeroxed copy of the hundred dollar bill that was given to the confidential informant prior to him going to Mr. Callahan's residence. Also I wrote right underneath it where I found the hundred dollar bill, Mr. Callahan's pocket, right front pocket. It is initialled [sic] by myself and also initialled [sic] by Detective Whatcott.

Q Let's jump ahead. You actually were down at the scene when Mr. Callahan was apprehended?

A Yes, I was.

Q And how did you find the hundred dollar bill?

A Yes, I did.

Q Would you explain that to the jury, what you did?

A Yes. After the suspects were detained and handcuffed in the little porch area outside the trailer, they were all brought into the trailer, into the kitchen area of – the kitchen/living room is together. It was in the kitchen area, and I advised all three of the subjects of their constitutional rights.

I asked each one of them individually and independently if they understood their rights. They stated that they did. I [131] then asked Mr. Callahan if it was his residence. He stated that it was. I asked him if there was anymore narcotics or meth in the residence. He stated, no, that there was not. I then asked

him if we had his permission to search and he stated, yes, that we could.

Mr. Callahan was then searched by myself. He was handcuffed at that time. I reached into his right front pocket where I pulled out a hundred dollar bill in U.S. currency. I then asked Detective Whatcott to retrieve a copy of the xeroxed money that had been given to the confidential informant prior to going to the residence, at which time Jeff retrieved this xeroxed copy of the money. The numbers corresponded off of the bill with the numbers on the xeroxed copy that we had made prior to the confidential informant arriving at Mr. Callahan's residence.

Q Did you assist in the search of the house then?

A No. I pretty much stayed in the kitchen with the suspects. The other officers conducted the search of the residence.

Q Some question earlier about acquiring a search warrant to go in before you actually went in the house, do you recall those questions being asked earlier?

A Yes, I do.

Q Did you consider doing that?

A For a brief moment, but we did not have enough time [132] to do it.

Q Why wouldn't there be enough time?

A Because we did not arrive here until 10:30 p.m. that evening, myself and Sheriff Gleave. Mr. Bartholomew had talked with Mr. Callahan several hours earlier. We knew he was getting to a point to where Mr. Callahan might not have any drugs left at his residence.

Q Why would that be?

A Because it's common knowledge with drug dealers in small communities throughout our state when they get narcotics, a lot of times the money fronted to them by other individuals that are using narcotics or they only get a certain amount. Usually we have found out that the people that are distributing controlled substances in the small counties never have the drugs longer than four or five hours at a time and then it's sold. So I knew he was getting to that time limit.

Q Two hour time period would have been enough time for him to get rid of it?

A Well, it was longer than that, because he called – it was about three hours by the time because he called Detective Jenkins at approximately 8:00 p.m.

Q Did you consider that to be an exigent circumstance?

A Yes, I did.

Q Were there others that you considered?

[133] A Several others that I had done.

Q What were the other exigent circumstances that you considered?

A Narcotics, once you purchase it, a person sees someone or gets paranoid, people are very paranoid on methamphetamine. They can destroy the evidence very quickly by flushing it down the toilet, destroy it, or someone leaves the residence carrying it. Very easily destroyed because it's very small.

Q In addition to just finding meth in a home, what was your other law enforcement goal? What other crime were you investigating?

A At that particular time we was investigating anything that dealt with controlled substances. Is that what you are asking me?

Q Yes.

A Narcotic, paraphernalia.

Q Yes.

A We looked for packaging material narcotics can be packaged in. We looked for scales. We looked for ways that people use narcotics, like hypodermic syringes, straws, mirrors.

Q Well, specifically, were you looking at – to investigate possible distribution of controlled substance?

A Yes, we were. That's what we initially went there [134] for was to purchase a controlled substance, methamphetamine, from Mr. Callahan.

Q Did you see a need to carry through with that investigation? Even though you might have had probable cause to believe that there was narcotics in the house, did you want to continue your investigation of distribution?

A Yes, sir.

Q Why is that important to you as a commander of the Task Force?

A Because that's our main concern is to arrest people that are distributing drugs in our communities.

Q Commander, could you tell us why it is that you use controlled – excuse me, confidential informants similar to Brian Bartholomew in your work?

A Yes, sir. Narcotics is a covert detail, okay? We work covert operations where we try to infilter individuals or groups of people that are distributing, or possessing, or manufacturing, or cultivating controlled substances within the Task Force area. It's very hard in small communities for myself or one of my officers to walk into a house such as Mr. Callahan's and purchase narcotics from him. He's not going to let them do that.

People only deal with people they know in these small communities, so a new face is going to scare them to death. So, therefore, we have to use confidential informants, someone [135] that they are familiar with that they know and they trust to get them to purchase the narcotics.

Q Is this a common way for the Task Force to operate in other areas where you work?

A Yes, sir.

Q Is it the more common way that you perform your work?

A Yes, sir.

Q These type of confidential informants?

A Yes, sir.

MR. ANDERSON: Can I approach the witness, Your Honor?

THE COURT: You may.

Q (BY MR. ANDERSON:) I'd like to have you look at Exhibit No. 4, and ask you, based on your training and experience, are you familiar with the packaging of methamphetamine?

A Yes, sir, I am.

Q Is Exhibit No. 4 an example or a typical –

A It's typical the way that methamphetamine is packaged.

Q In those kind of baggies?

A Yes, sir.

Q Is that a typical amount that's distributed on the streets?

A Well, it depends on how much you are buying. This is – and I know that the weight that the – I heard him [136] testify that there was just a little over half a gram instead of a gram, but that is the package that one gram of methamphetamine would be packaged in. That's the typical way it is packaged.

Q What would be typical price for – sale price for that packet of – packet or baggie of methamphetamine?

A One hundred dollars.

Q Is that true not only in Fillmore but other areas?

A That's pretty much common. It's just the going rate is a hundred dollars a gram.

Q I'll hand you Exhibit No. 6 and ask if you will take the contents out of that and examine those baggies. Again, are those baggies typical of the amount distributed on the street?

A Yes, sir, it is. It's consistent with what we usually purchase and what it's packaged in.

Q For how much?

A One hundred dollars.

Q Is there sufficient there for a person who is in the business of distributing methamphetamine – would that be a sufficient amount for him to be in the business?

A In these smaller areas, that's a very sufficient amount. Because most of the time you buy quarter grams which is one quarter of what's in that bag.

Q How much would a quarter gram sell for?

[137] A Between 30 and $35.

Q And, again. Exhibit No. 13, if you would respond to a similar questions.

A Yes, sir. It's consistent with the way methamphetamine is packaged for sale, from the way that we buy it, and the packaging material that is used to package it in.

Q What would be the value of what you see in Exhibit No. 13?

A I would say that would be sold as a gram.

Q Are you familiar with the effect that methamphetamine has on the human body?

A Yes, sir.

Q Would you explain that to the jury, as you understand it?

A It stimulates the body. People become very hyper, very hyperactive on it. Consistent use of it, and long term use, and people that are shooting it or injecting it into their systems, sometimes end – go into the hallucinogen state to where they see things, different types of things. I've talked to people that will tell you they've seen dragons and ghosts and

monsters chasing them. That's the way it reacts to the body.

Q Are syringes used in the taking of methamphetamine into the body?

A Yes, they are.

[138] Q And how is a powder used in the syringes?

A Powder is usually placed into water where it is put into and usually – doesn't have to be a spoon. This goes way back to the old heroin addict stage where all the person [sic] used heroin, shot heroin, people still use spoons to put the water, methamphetamine into it, sucked into the hypodermic syringe, and then injected into a vein in the human body.

Q I believe you indicated that a quarter gram would be a typical purchase for personal use. How much of a quarter gram would be used at a time?

A Probably a quarter of it.

Q So a quarter gram would go four times?

A Four times, uh-huh (affirmative).

Q Exhibit No. 17, if you will look at those, been identified as syringes, are those suitable for the injection of methamphetamine into the human body?

A Yes, they are.

MR. ANDERSON: I think that's all I have, Your Honor.

THE COURT: Okay. Mr. Harmon, cross.

CROSS-EXAMINATION

BY MR. HARMON:

Q Commander Pearson, did you have any information regarding the reliability of Brian Bartholomew as a confidential informant?

[139] A Yes, I do.

Q Can you tell us what that was?

A I had been with him on a previous purchase in Millard County on another individual.

Q Okay. How – what was the amount of time lapse between that prior occasion and this day?

A Probably two or three weeks. I would guess somewhere in there.

Q And any other experience that you had with regard to his reliability?

A Yes. He had made several purchases for us prior to this one. But I was not present with them.

Q And those prior cases after the purchase was made, did members of the Task Force then enter the home of the seller and search it?

A No, sir, because I don't believe any of those purchases were made at a home.

Q Okay. Was there – in your working with the confidential informant, is there any program that you have to test them on a continued basis to see if they are staying drug free themselves?

A We test them randomly, yes. But as far as a set up program where we say we're going to do it every third time, no.

Q Do you know if there had been any tests made on Brian [140] Bartholomew from the time he was bought into the program until March the 19th?

A I don't remember if there was. You'd have to ask Detective Whatcott. I don't believe there –

Q Brian has testified that he continued to use drugs while he was acting as your confidential informant, does that create any concern on your part regarding his reliability?

A Well, it does. When he testified, I didn't – I don't think he said he continued to use drugs. I think he said he tasted some drugs at Mr. Callahan's residence that day.

Q But we can have that testimony – but he did testify he continued to use drugs and has done so up until this case started. He's in the rehabilitation program now.

A Yes, I realize that.

Q Were you advised that there had been chemical tests given to Brian the evening of March the 19th?

A No, I was not advised of that.

Q Is that something that would have been desirable to have done before you let him out to do the work?

A No.

Q Could have easily been done, couldn't it?

A Well, anything can be done. Yeah, it could have been done.

Q But it's not a large task to do that. He just had to [141] breathe into the breathalyzer that was there in the building. There was a portable kit to test his urine?

A The urine probably wouldn't have been a problem. The breathalyzer could have been a problem. I don't know where it's located. If it's located in the jail, it could have been a major problem because it can compromise his identity.

Q But you request – you didn't make any request that that be done of Brian?

A No, sir.

Q Do you feel at this point your judgment in letting him go out now is placed in question?

A No, sir.

Q You indicated that Brian was searched at the jail prior to his going out, and I take it that you left that up to Officer Whatcott?

A Yes, I did.

Q Were you there when the search was conducted?

A Yes, I was present in the room when Jeff searched him.

Q Did he have him pull his pockets out, the inside out?

A I would say yes that he did because we always do that.

Q Did you ever see Officer Whatcott place his hands inside the pockets?

A Well, if they was pulled out, I don't think he put [142] them inside.

Q That's your best judgment about putting them inside?

A I don't know what Jeff did.

Q You were there and watched him, that –

A No. I was there. I don't – there's a lot of things going on at that time. I didn't sit there and watch Jeff to see how he searched him, no.

Q You don't know what was in his change pocket at that time then, do you?

A No.

Q We've talked about the hundred dollar bill that was given to Brian. Where is that hundred dollar bill now?

A It went back to the – well, it actually was given back to Detective Jeff Whatcott that evening, it was compared to the copy, and it has probably been used to purchase some more drugs since.

Q So the jury is not able to compare the serial numbers on that with the photo copy that you have?

A No. If every time we impounded money that we used and we busted somebody, we'd be broke because all of our money would be in the evidence vault.

Q Do you get to use money that's forfeited?

A Not anymore.

Q Legislature took that from you, is that –

A Correct.

[143] Q Now, you indicated you felt you didn't need a warrant because there were exigent circumstances. Did you feel you had enough facts that would allow you to secure a search warrant?

A No. I thought we were very slim. He had been there only one time, and it had been, you know, three or four hours, whatever it was, earlier. I thought we were slim. We probably could have wrote a warrant, maybe, and maybe not. Maybe the judge would have told us we needed more than just him being there

four hours earlier, because most judges say, well, how do you know the dope is there now.

Q But there was no attempt made to get the warrant?

A No, there wasn't.

Q And you indicated that there's a possibility that the drugs could have been sold to other people?

A Very easily.

Q That would have been someone coming and going from the Callahan home?

A Yeah. Coming or going.

Q Drugs could have been destroyed?

A Yes, sir.

Q And that would have meant that someone would have tipped Callahan off that something was wrong. And was it because of these things that you had the home placed under surveillance?

[144] A The home was placed under surveillance for about thirty minutes prior to us making the purchase.

Q Would it have been possible to place the home under surveillance from 9:00 on?

A No, it wouldn't have been possible.

Q Why not?

A Because we didn't have enough personnel over here. Some of us has to drive 90 miles to get here.

Q Did you ask Officer Whatcott if they could –

A No, I didn't.

Q – to conduct surveillance? Is it possible he could have asked for that help?

A Anything is possible.

Q So when you had your officers enter the home, you were relying, then, on what you heard on the radio being broadcast from Brian Bartholomew?

A That's correct. We was – we had been given the okay by Detective Whatcott, had – the purchase had been made, and we entered the residence.

Q He's relying on what he hears on the radio –

A Correct.

Q – from Brian Bartholomew? Now, the jury is able to determine what he did hear on the radio because we have the tape. You had a chance to hear that too?

A Yes, I did.

[145] Q Have you heard the tape before?

A No, I hadn't.

Q We've talked about, and you've talked about the amount of methamphetamine that a person would

use, and you referred to out here in the country. Do people out here in the country use less methamphetamine than perhaps a drug user in the city would use?

A No.

Q Are there times when a person may stock up a supply of drugs for his own personal use?

A Very seldom.

Q What would determine whether or not they would?

A If they have a lot of money and are rich.

Q And in this case, we know that the amount of drugs, total amount of drugs involved in this is just over two grams. Based on your testimony, I assume that that would have cost just over $200?

A Let's see, there's one, two, three, four, five, six baggies?

Q Yes.

A That he is selling for $100 a gram. One thing about drugs, when you buy from drug dealers, the weight is never right. They cheat you every time. It's always light. Okay. I would probably, you're about right, that that's probably about what he paid for it

[146] Q So you can go buy two grams for $200?

A Uh-huh (affirmative).

Q Was Afton Callahan represented to you as being a drug user?

A He was represented to me as being a drug dealer?

Q Nobody ever talked about the problem he had with his personal use of drugs?

A Not to me.

Q Were there officers that you've become aware of now that knew that he was a regular drug user?

A I haven't talked to anybody that says he's a regular drug user.

Q Have you talked with his probation or parole agent?

A No.

Q Under the manner in which the Task Force works, would it have been possible for Officer Whatcott to have authorized and moved on this controlled buy prior to your arriving?

A Yes, he could have.

Q Do you know why he waited?

A Yes, to get some more help there.

Q And, of course, that meant he needed more help if there was going to be a search and entry into the home?

A No, with the individuals going to be arrested.

Q Where – let me go back to the dealing in methamphetamine. You've indicated the packages you have there [147] are consistent with the way they are packaged for sale. That would mean they are also consistent with how they would be purchased?

A Yes.

Q So a user would purchase methamphetamine in the condition that we see there?

A Yes.

Q And then they may have that without intent to sell but to use personally?

A Not that much.

Q How often would a regular methamphetamine user use methamphetamine?

A It depends on how much he's used and what the tolerance he has built up in his system. Each individual varies. I've seen people shoot four or five times a day. I've seen some people shoot once a day.

Q Those that shoot four or five times a day have been into the drug scene for a periods of time; is that right?

A Yes, sir.

Q And if you needed drugs four or five times a day, then you are going to need several grams to keep you going for even a week, wouldn't you?

A Not several grams – probably for a week, yeah, if you were shooting five or six times a day.

Q As the methamphetamine goes into the human body, you [148] described that it does somethings there, it stimulates the person. They become nervous, kind of hyperactive. And if they've used enough, they begin to hallucinate. Do they also have some confusion of their memory?

A Meth users usually don't get confused too much. Pot smokers do, they forget.

Q Do they have some memory loss?

A I couldn't tell you that. I'm not a doctor. I don't know whether they do or they don't.

Q You talked about the way methamphetamine is injected and you've indicated that it can be put into some type of a solution to become soluble, and it can be pulled into the needle, then injected; is that right?

A That's correct.

Q Is it common for people who are letting the methamphetamine become a solution in water to heat that?

A Methamphetamine doesn't have to be heated. I've seen people use it that didn't heat it at all. I've seen other people heat it.

Q Would it be fair to say that many times you will see spoons around with burn marks on the bottom,

that's an indication somebody has been heating up some drug for injection?

A Yeah, that usually goes back to the cocaine or heroin users. That just kind of went over to the meth users to where [149] they heat it.

Q Is there a lot of use of methamphetamine?

A Yes, sir.

Q More than there is heroin or cocaine?

A Yes, sir.

MR. HARMON: I think that's all we have, Your Honor.

THE COURT: Quickly, Your Honor, if I could.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Would you state your name and occupation for the Court, please.

A Clark Thomas. I'm a deputy with the San Pete County Sheriff's Office, Assigned to the Central Utah Narcotics Task Force.

Q How long have you been a peace officer?

A Just about four years.

Q And have you been in the courtroom then mostly hearing the matter before the Court today?

A Yes, I have.

Q Do you remember the incident yourself?

A I do.

Q Do you recall when you first became involved, what – how did you first become involved?

[150] A I received a page that evening, the night of March 19th, and they requested that I come over to the Fillmore area. I reside in San Pete County. I drove over here and met with Detectives Whatcott, Jenkins, Commander Pearson, Sheriff Gleave, and a confidential informant.

Q Did you go to the Callahan residence at Chalk Creek Trailer Park?

A I did.

Q Would you describe what your role was there?

A At the trailer park?

Q Yes.

A After receiving a radio transmission from Detective Whatcott, myself and Detective Jenkins entered the residence at that time.

Q Do you remember who was first?

A I was the first one in the door.

Q Describe what you did?

A The first individual I contacted upon entering that door, it's a just a built plywood structure. I'm sure you've got the idea of what it is from other testimony. I opened the door. The first individual I contacted there was Mr. Bartholomew. He was ordered to the ground. The next individual that I contacted was Adam Evans. He was ordered to the ground. I moved him to my right. Detective Jenkins, I don't know how to explain it, supervised the custody of Adam [151] at that lime. He was placed on the ground.

As I was moving Adam Evans to the right, a lot of commands, "Police, get to the ground." As I was moving him to the right, I could see Mr. Callahan, who is seated there in the red shirt, standing in the proper doorway of the trailer drop something from his hand. I paid no further attention to that as I grabbed his hand and placed him on the ground. As he was placed on the ground, before I could handcuff him and secure him, Nick Evans showed up at the proper door of the trailer. He was ordered to the ground by Detective Jenkins and also by Sheriff Gleave, probably at least four or – four times.

He didn't respond to those commands. I then reached up with my left hand and assisted Sheriff Gleave in placing him on the ground.

Q Could you describe the item that you saw come from the hand of Afton Callahan to the floor?

A Yes. It appeared to be the plastic bag that you had already shown to Detective Whatcott that contained the other bags.

Q Where did it fall on in the porch, if you recall?

A Right in the proper doorway of the trailer.

Q In the porch area or in the trailer area?

A In the porch area, just outside of the trailer.

Q Was it moved and disturbed? Does anyone handle it [152] after you saw it drop out of Mr. Callahan's hand?

A I have no idea. My main concern at that time was securing the suspects, searching them for weapons. We still had to clear the inside of the trailer. I didn't concern myself with what the item was at that time at all.

Q Did you see it later?

A I did. Detective Whatcott retrieved it and we did inspect the package because it was placed into evidence bags.

Q Did it look like what you had seen come from Afton Callahan's hand?

A Yes.

Q Did you search Adam Evans?

A I did.

Q Where did that take place?

A That was in the kitchen area of the trailer. I removed his wallet, handed that to Commander Pearson. Continued to search and discovered a hypodermic needle in his right front pocket.

Q And was that placed into evidence?

A Yes.

Q Is that here in Court today?

A Yes, I believe it is.

MR. ANDERSON: May I approach the witness, Your Honor?

THE COURT: You may.

[153] MR. ANDERSON: May I have the witness open the package, Your Honor?

THE COURT: He may. Why don't we keep the needle in the envelope and have one exhibit. I think that will make it easier.

Q. (BY MR. ANDERSON:) Officer, would you look at Exhibit No. 18, the little number here, Plaintiff's Exhibit No. 18, tell the jury what it is, if you recognize it?

A Yes. It's one of our evidence envelopes. You've heard the description in prior testimony it's a manila envelope. It contains one hypodermic syringe. It has our case number on it. It also has a suspect name Adam Evans and it also has my name on the bottom. It was impounded under our case number as item

number four which will be on the evidence sheet. It also has my initials on the evidence tape that was sealed.

Q Would you look at the needle inside to see if that appears to be the needle you found on Adam Evans?

A Yes. Do you want it resealed?

MR. ANDERSON: I guess not. We'd offer Exhibit No. 18.

THE COURT: Any objection?

MR. HARMON: No.

THE COURT: It's received.

(Plaintiffs Exhibit No. 18 [154]
Was received into evidence.)

MR. ANDERSON: I believe that's all I have, Your Honor.

THE COURT: Any cross-examination, Mr. Harmon?

CROSS-EXAMINATION

Q Officer Thomas, as you approached the Callahan residence, you were acting on the direction of your supervisor, Officer Whatcott?

A Yes.

Q Had you heard the radio transmission coming from the confidential informant?

A Parts of it.

Q Were you relying on that transmission to give you authority to go into the trailer?

A No. I was relying on the transmission from Detective Whatcott.

Q Okay. Had there been any discussion with you about securing a search warrant where the Court would authorize you to go into the trailer?

A Not that I recall.

Q You were just part of the Task Force following the directions of those in charge?

A Yes, sir.

Q As you – were you the first one to the door on the [155] porch?

A Yes.

Q And was the door being shaken by someone inside?

A I heard Detective Jenkins testify to that earlier, but I can't recall the door being jiggled. I approached the door, opened the door.

Q How did you open the door?

A With my left hand.

Q What did you grab on the door to pull it open?

A I don't recall if there was a handle or if it was just the edge of the plywood door, sir.

Q Okay. I'm going to show you a picture which has been marked as Defendant's Exhibit 19, ask if you recognize that?

A Yes, I do.

Q What is it?

A It's the – it's a picture of the porch area that we've described the Callahan residence and a picture of the door.

Q It shows the front door?

A Yes, sir.

Q Does it show the small wood fastener to the side of the door?

A Not – I –

Q Was the door shut as you approached it?

MR. ANDERSON: I don't think the witness has answered [156] the question.

Q. (BY MR. HARMON:) Okay. I'll go back to the picture. Do you recognize the stick that was used as a fastener for the door.

A I don't recall it. I recall that this is the attachment, what we've been referring to as the porch

area of the Callahan residence. I don't recall what kind of handle or if there was a handle. I don't.

Q When you approached the door, did you knock prior to entering?

A No.

Q You entered directly?

A Yes, I did.

Q And when you opened the door, could you describe for us the lighting of the interior of that building.

A I don't recall if there was an overhead light or – the visibility was okay. It was dark. It was late in the evening. There was ambient light from the other residences in the area. There was ambient light being produced from the residence into the porch area, but I don't recall if there was an overhead light in the porch area. I don't.

Q Okay, I'm going to show you exhibit – Defendant's Exhibit No. 20, ask you if you can identify that for us and tell us what it is? If you were to –

A I have no idea.

[157] Q Do you recognize this, as you open the door and looked in, that's the interior of the porch?

A That would be an assumption on my part. I have no idea. I don't know.

Q Let me show you Defendant's Exhibit No. 21, ask you if you recognize that. If you do, tell us what it is?

A This appears to be the interior portion of the porch area, drum set. There's a bicycle in the corner, exterior window on the trailer.

Q And was the drum set in that position when you went into the home?

A I don't recall.

Q I'm going to show you Exhibit No. 22 and ask if you recognize that. If you do, tell us what it is?

A I don't recognize it, but it's a – I don't know if it's a washer or drier [sic], appears to be in the corner of that porch area

Q When you entered the porch area, was there a washer or dryer there?

A I don't recall. I don't. My primary focus was on detaining suspects and officer's safety. I don't recall if there was a washer and dryer there, sir.

Q You indicated you saw a plastic bag dropped in the area of the front door?

A No. I stated they seen Mr. Callahan drop a plastic [158] bag from his hand in the area of the front door.

Q I'm going to show you Exhibit No. 23, ask if you recognize that, and if you do, tell us what it is?

A It appears to be the main entrance to the trailer. plywood floor of the porch.

Q Is there a crack between the plywood floor and the trailer?

A Possibly. You can see the line from the photograph. It's hard to tell if they are actually joined or not.

Q As you opened the trailer door, what was the first thing you saw?

A When – I mean, the trailer door – I mean, the door that went into the porch? The porch area door, I contacted the confidential informant.

Q Was he standing right there in front of the door?

A Just kind of on the right side of the door.

Q Was he trying to get out?

A I don't know. I don't know what he was trying to do. I entered, ordered him to the ground, and as I stated earlier, I contacted Adam Evans. As he was ordered to the ground, Detective Jenkins took control of him, and I put Mr. Callahan on the ground.

Q Now, Detective Jenkins has indicated to us in his testimony that when the two of you were in there putting these people on the ground, the door going into the living area of [159] the trailer was shut, and he saw that door being shaken, and it was opened.

When they opened it, there stood Nick Evans. Do you recall that?

A I don't. All these events took place in just a matter of a few seconds. I was trying to get handcuffs on Mr. Callahan. When the door opened, I don't believe I was looking at the door. I had already stated I heard Detective Jenkins and Sheriff Gleave commanding Nick Evans to get on the ground. At that time is when I reached up and helped Sheriff Gleave place Nick Evans on the floor.

Q Had you ever seen Nick Evans or Adam Evans prior to this time?

A No.

Q Had you ever seen Afton Callahan prior to this time?

A No.

Q Could you tell us how Afton Callahan was dressed that night?

A No. I don't recall how he was dressed.

Q Do you recall how Adam Evans was dressed?

A I don't.

Q Do you recall how Nick Evans was dressed?

A No, sir. I don't recall how I was dressed other than a raid vest. I really don't.

Q Okay. Now, you indicated that Adam Evans was searched?

[160] A Yes.

Q Tell us again who conducted the search of him?

A I believe he had a – I believe Detective Jenkins just initially done a pat search for weapons. But after he was brought into the kitchen and the trailer was cleared, I searched him. I removed his wallet. I handed it to Commander Pearson. Commander Pearson searched that. I searched the rest of his person. And in his right front pants pocket is where I removed the hypodermic syringe which is just entered.

Q And you conducted the thorough search of him as you had been trained; is that correct?

A Yes.

Q Did you conduct a search of Ryan [sic] Bartholomew prior to coming to this Callahan residence?

A No, I did not.

Q Had you seen anyone search him?

A I don't recall being present during that portion.

Q But you did conduct a thorough search?

A Yes.

Q Did it surprise you when later on someone told you they found a baggy of methamphetamine on Mr. Evans?

A Yes, it did. It was secreted in a small belt buckle. Yes, it did.

Q But ordinarily you would have expected to have picked that up; is that right?

[161] A Sir, I don't believe I've ever looked inside a belt buckle. We have missed things on searches before. It's not common, but we have.

Q Okay. Do you know if the needle that was removed from Adam Evans was ever submitted to the Crime Lab for analysis to see if it had been used with a controlled substance?

A I don't know it was.

MR. HARMON: Okay. That's all I have.

THE COURT: Anything else, Mr. Anderson.

MR. ANDERSON: No. Your Honor. Thank you.

THE COURT: You may step down. Thank you. Next witness.

MR. ANDERSON: Can he be excused if he wants to be?

THE COURT: Any reason why the officer cannot be excused?

MR. HARMON: We have no objection

THE COURT: You can go fishing too if you want.

THE WITNESS: Thanks, Your Honor.

MR. ANDERSON: We'll call Marty Gleave

THE COURT: Okay. Sheriff Gleave, come forward. Raise your right hand and take on oath.

SHERIFF MARTY GLEAVE

Called by the Plaintiff, having been duly Sworn, was examined and testified as follows.

[162] THE CLERK: You do solemnly swear that the testimony you are about to give in the case now before the Court will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: Have a seat.

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Would you state your full name for the Court, please.

A Marty Scott Gleave.

Q Your occupation or position?

A I'm a Piute County Sheriff.

Q Elected sheriff?

A Yes.

Q Is that a pretty exciting job over there in the wild west?

A Every once in a while, yeah.

Q How long have you been a sheriff?

A Just over four years.

Q Are you a member of the Task Force?

A Yes.

Q And why is it that the sheriff is a member of the Task Force, not a deputy?

A My whole department basically assists the Task Force [163] in numerous – time to time.

Q You perform that role for Piute County?

A Off and on, yes.

Q Piute County is a part of the Task Force?

A Yes, they are.

Q Do you then participate in Task Force law enforcement activities outside Piute County?

A Yes.

Q I guess that's part of the assignment you give yourself, is that it?

A Yes.

Q I take it you've been in court during part of the testimony in this particular case; is that correct?

A Yes, I have.

Q Do you recall the incident itself?

A I do.

Q On March the 19th of this year, did you come to Fillmore?

A Yes, I did.

Q Do you remember when you arrived and where you went?

A I arrived with Commander Pearson around 10:30 at night. We first went to here at Millard County Sheriff's Office.

Q Can you describe the role you played then at Chalk Creek Trailer Park? Did you go there?

[164] A I did.

Q What role did you play there?

A I assisted in the apprehension of the suspect that just sold narcotics to an informant.

Q And did you perform any part of the search at the house?

A I did

Q And what did you do?

A I entered the residence with Detective Jenkins and Detective Thomas. And once the house is cleared and the suspects were back in the kitchen area, I searched Nick Evans.

Q Did you search Nick Evans then?

A I did.

Q Did you find any items of evidence?

A I did.

Q What did you find?

A I found a hypodermic syringe.

Q Where was it?

A It was in his right front pocket.

Q Was that placed into evidence.

A It was.

MR. ANDERSON: Can I approach the witness, Your Honor?

THE COURT: You may.

MR. ANDERSON: May he open this package?

[165] THE COURT: Yes.

Q. (BY MR. ANDERSON:) Will you remove the content from that then we can mark it? Would you look at Exhibit No. 24 and just, again, for the

jury and for the record, tell the Court if you recognize that and the contents of the bag?

A Yes, I do.

Q And how do you recognize it?

A By my initials on the evidence seal.

Q Just describe what it is?

A It's the manila envelope in which we use to seal evidence, and then at the time the evidence is placed in the bag, a piece of tape is put on there to seal it, and initial – we initial both on the tape and on the envelopes.

Q Did you put your initials there?

A I did.

Q And what is the contents of the manila envelope then?

A It's the syringe that was found in Nick Evans' pocket.

Q Did you talk to Nick at all about that or did you have any conversation with him?

A I asked Nick at the time if he was shooting – when I pulled this out, and asked if he know that shooting that stuff would kill him. And he just shrugged his shoulders. He didn't say much.

MR. ANDERSON: We'd offer No. 24, Your Honor.

[166] THE COURT: Any objection.

MR. HARMON: No

THE COURT: It's received.

(Plaintiff's Exhibit No. 24
Was received into evidence.)

MR. ANDERSON: I don't believe I have any other questions.

THE COURT: Any cross-examination?

MR. HARMON: Just briefly.

CROSS-EXAMINATION

BY MR. HARMON:

Q Sheriff Gleave, do you know if the syringe that was testified or identified as Exhibit 24 was ever tested to see if it had been used?

A I'm not aware.

Q So we don't know if it had been used to inject controlled substances or not?

A I'm not sure.

Q Have you seen syringes similar to this that are used by diabetics?

A I have

Q And does this appear any different than that?

A Not really.

Q It may be entirely lawful to have a syringe such as [167] this; is that correct?

A I'm sure it probably is.

Q When you began to work with Nick Evans, can you tell us what his demeanor and condition was?

A Nick Evans was very nervous at the time, and then later just sat on the couch mostly with his head ducked.

Q Do you think he understood what was going on?

A Absolutely.

Q Were you aware that Afton Callahan was also searched at the trailer?

A I never did have any contact with Mr. Callahan.

Q Anybody record to you that any drugs or paraphernalia were found on him?

A I seen some narcotics, but I don't recall that, no.

Q Nothing was reported that it was found on him, at least it wasn't reported to you?

A Not to me.

Q Prior to your going to the trailer, had you met with the group of people who were going to do this operation?

A I did.

Q Was there any discussion about the fact that Afton Callahan was on parole?

A Not in front of me.

Q Were you ever aware of that fact?

A I think that when we got into the jail someone said [168] that he was on parole, but I didn't know it until then.

Q Are you familiar with the parole system?

A Very familiar.

Q Who would be the most important law enforcement officer in Afton Callahan's life?

A His parole officer.

Q And does that parole officer have some special authority with regard to search and seizure that other officers don't have?

MR. ANDERSON: I object, Your Honor. I don't think this witness is qualified to testify about that.

THE COURT: If he knows. Overruled.

Q. (BY MR. HARMON:) Does he have some special authority?

A I think that a parole officer probably has special authority on parolees.

Q He has the right at any time to ask the parolee to allow him to search his residence; is that correct?

A Yeah. I think so.

Q In the conversation that you had among the team that was going to do this operation, did anybody ever talk about getting the parole officer to aid and assist you?

MR. ANDERSON: I think it's outside the realm of direct, Your Honor.

THE COURT: Overruled.

THE WITNESS: Will you ask that again?

[169] Q. (BY MR. HARMON.) As you met as the team that was going to do the operation, did anybody talk about the possibility of getting the parole officer to aid and assist you?

A Not in my present.

MR. HARMON: That's all I have.

THE COURT: Anything else, Mr. Anderson.

MR. ANDERSON: No, Your Honor.

THE COURT: You may step down. Thank you. He may be excused.

MR. ANDERSON: Officer Bill Jackson.

THE COURT: Okay Officer Jackson, come forward. Raise your right hand and take an oath.

* * *

[175] Q Officer Jackson, do you know what other officers in Millard County Sheriff's Department would have been available to assist Officer Whatcott the evening of March 19th?

A I would imagine any one that needed to be.

Q And so how many officers would have been available to him to call?

A I guess you could have called them out.

Q How many is that?

A Gees, I don't know, ten or twelve.

Q Okay. Was there enough on call that it would have been adequate for him to conducted this operation without the assistance from anyone from any other county?

A It depends on what you mean on call. I don't know which officers are off and where.

Q If you have a serious condition and it's not your time to be on active duty, are you subject to be called out?

A Yes.

Q Okay. Is that the same for all the other officers?

A Yes.

Q Now, you indicated that you were securing the front of the trailer, is that the area where the porch is located?

A Yes.

Q We talk about this being a porch, it's really a building that's attached to the manufactured trailer; is that correct?

[176] A Yeah.

Q Kind of a building there with a door, wall, studs, and wall – or floor material and everything?

A It's attached to the building though, the trailer.

Q Has a roof on top?

A Yes.

* * *

[190] OFFICER JEFF WHATCOTT,

recalled as a witness by the Plaintiff, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

BY MR. ANDERSON:

Q Officer, do you recall searching the person of Brian Bartholomew prior to the controlled buy?

A Yes, I do.

Q Would you describe, then, your search of Brian Bartholomew, how you performed the search, what you searched, what you found or didn't find?

A I checked. I had him pull his front pockets out, make sure there wasn't anything in there. I reached in the back pocket and retrieved the wallet. I looked through the [191] wallet. I then checked both, stuck my hand inside to make sure I checked the change pocket, thumbed around the inside of his waistband. I checked his shoes and inside of his socks.

Q And would that be a typical search that you perform on a CI?

A Yes.

Q Was it a thorough search in your mind?

A Yes.

Q Were you satisfied that he didn't have any controlled substance on his person?

A I was.

Q And in his change pocket, any other pocket, or any other location?

A He didn't have any in his pockets. I know that for sure, including the change pocket.

MR. ANDERSON: That's all I have, Your Honor.

THE COURT: Mr. Harmon.

CROSS-EXAMINATION

BY MR. HARMON:

Q Could you tell us how you searched his change pocket?

A Same way. I retrieved the bag that he told me he had bought from Afton Callahan. I reached my right index finger in the pocket, about all you can get in, and swooped – swept inside the pocket.

[192] MR. HARMON: Okay. That's all I have on that, Your Honor. I could ask the officer some questions. It would be out of order, but without having to call him –

THE COURT: Do you have any objection as to his case in chief, if he asks those questions now, Mr. Anderson?

MR. ANDERSON: We're finished with our case in chief anyway.

Q. (BY MR. HARMON:) Officer, Whatcott, you were aware that Afton Callahan was on parole; is that right?

A Yes.

Q And did you know who his parole officer was?

A I did not. I know that Marty Abrahms (tat) is one assigned to it, usually assigned to ones. I don't know if it would be he or Ron Wilson.

Q Are you well acquainted with Mr. Abrahms and Mr. Wilson?

A Yes.

Q Have you worked with them frequently before?

A Yes, I have.

Q Are they willing to cooperate with you on drug investigations?

A Yes, they are.

Q Do they have special authority to conduct search and seizures of people that are on parole?

MR. ANDERSON: Your Honor, I object to this line of [193] questioning Again, I don't think this officer is qualified to answer those questions.

THE COURT: Overruled.

Q. (BY MR. HARMON:) Do they have special authority?

A I assume they do. They are in charge of them.

Q And were they – either one of those gentlemen contacted as you put your team together to do this project of Afton Callahan's home?

A No, they were not.

Q Were they contacted after Mr. Callahan was arrested?

A Yes.

Q And was it that same evening?

A Yes, it was.

Q And did Mr. Callahan give them a statement as to what had happened?

A I wasn't present. I don't know.

Q Do you know if Adam Evans is also on probation?

A I can't recall if he's on with AP&P or a court probation. I don't recall.

Q And you don't know if he had a parole officer or not?

A I don't.

MR. HARMON: That's all I have, Your Honor.

REDIRECT EXAMINATION

BY MR. ANDERSON:

[194] Q Officer, what was Afton Callahan on parole for?

MR. HARMON: We'd object to this at this point, Your Honor.

THE COURT: Overruled.

THE WITNESS: I believe it was either possession or distribution of a controlled substance.

Q. (BY MR. ANDERSON:) Earlier?

A Yes.

Q Where?

A In the Fillmore area.

MR. ANDERSON: Thank you.

THE COURT: Anything else?

MR. HARMON: That's all we have.

THE COURT: You may step down. Mr. Harmon, do you desire to make an opening statement at this time?

MR. HARMON: Yes, Your Honor.

THE COURT: You may proceed.

MR. HARMON: Could we have a few minutes to confer with Your Honor before I make the opening statement?

THE COURT: Okay. Well take another five minute break. Mr. Anderson, does the State rest at this point in time?

MR. ANDERSON: Yes, Your Honor. Thank you.

(A recess was taken.)

* * *

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, VS. AFTON D. CALLAHAN, Defendant.	)	CASE NO. 021700044

BEFORE THE HONORABLE DONALD J. EYRE, JR.
FOURTH DISTRICT COURT
765 SOUTH HIGHWAY 99
FILLMORE, UTAH 84631
REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL
VOLUME III
AUGUST 7, 2002

[2] **APPEARANCES**

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[4] Fillmore, Utah; August 7, 2002

PROCEEDINGS

* * *

[6] MR. HARMON: Your Honor, I think that I've discussed some matters with the defendant, and I think that at this point he feels it would be appropriate that the case be dismissed, and that the Court should consider the motion that we had filed originally to suppress the evidence and dismiss the

case because of an unlawful search and seizure of his home.

I've advised him I would ask the Court if you want to consider that now. I've also told him that generally we would present that at the conclusion of the evidence. So the question is whether or not the Court would want to consider that at this point.

THE COURT: Well, you can raise that issue at any time, but I would rule based upon what the evidence is right now.

MR. HARMON: Well, that's –

THE COURT: Do you want to argue that?

MR. HARMON: Yes. We're prepared to argue that.

THE COURT: Go ahead.

MR. HARMON: In this matter, we have – the biggest concern that we have is the entry of the officers in the home. [7] The testimony that we have is that the officers entered the home based on what they heard from the confidential informant. They have testified that they did not, in their judgment, have sufficient evidence that they could secure a search warrant from a magistrate, and so that was the level of proof that they had before they go there and a confidential informant goes into the home.

What the confidential informant produced for them is what is on the tape there, and it would have been what they heard on that that we've heard here

that would have given them the right to enter the home. We don't think that's clear enough or capable enough for interpretation to give us a solid basis to authorize the violation of the right against unreasonable search and seizure or intrusion into the home.

Furthermore, the confidential informant was in a compromised position because of his prior use of methamphetamine. He was described as being high on methamphetamine, and admitted use of alcohol, between six and eight beers. The officer had a full opportunity to get some solid evidence with regard to his condition by either administering a breath test or doing a portable chemical test on him. Either one of those would only have taken a few minutes. They determined not to do that.

They determined that they would base their judgment on their own observations of him. They didn't do any field [8] sobriety tests at all. So we know that we have a compromised informant that goes in there. And I think that with that, we don't have a solid enough basis to authorize them to enter the home, and we think that all evidence from that point should be suppressed, Your Honor.

THE COURT: Okay. Mr. Anderson, your response?

MR. ANDERSON: Well, Your Honor, we argued before the condition of the confidential informant is a matter that goes to the weight of the evidence not to an issue of whether there was a constitutional or illegal search of the defendant's

home. But the fact is the officers all testified that they had observed him, that he, based on their training and experience, many, many years of training and experience, that he was competent to proceed.

They knew he had been drinking but they worked with him. They talked with him. They'd observed him. They could see that he was in a suitable condition. Even though he had been drinking, he was in suitable condition to go and perform the type of work that they expected him to perform. He gave them reliable consistent information. They talked to him over a period from the time he first reported the information at 8:00 until later about 11.00. As Officer Dwight Jenkins testified, he consistently told the same story, gave the same information about what he had seen in the house, and that based on his information alone was probable cause.

[9] THE COURT: Well, we're talking about entering a home, Mr. Anderson. What's your basis for the officers entering the home?

MR. ANDERSON: Exigent circumstances, Your Honor. There has been considerable testimony about that, what the officers were doing were attempting to investigate the distribution of controlled substances, and that in and of itself is an exigent circumstance. Not only that, but Officer – Commander Pearson testified that based on his extensive training and experience in small communities, there is not time to go and get a search warrant where

there's even the quantities in a home that existed in this case because it's going to be gone.

It's going to be sold. It's going to disappear. It's going to walk out of the house. It's going to be destroyed if there's any thought that the police are coming. And so it's exigent circumstances that justified them going to the home. The actual search of the house, Your Honor, was with the consent of Afton Callahan. They asked him, and after advising him of his Miranda rights, and he gave permission to search the home. So the –

THE COURT: I think we're talking about the initial entry.

MR. ANDERSON: Exigent circumstances, Your Honor. Again, the justification was that they had ample credible [10] evidence that there was controlled substances in the house, that there had been a – not only a substances in the house, but there had been an actual distribution. and that there was more in the house being held for distribution. This was 11:00 at night. This was a time in Millard County when it would have been – it would have been hours, maybe the next day before a search warrant could have been obtained to search that home. And by that time, it would have been gone. The testimony is that the methamphetamine was being used by Mr. Callahan, by – being used by others in the home, possibly other customers would have come. And as soon as word got out that the meth was there for sale, it would have been gone.

And there just simply was not time to go and get the search warrant, to use a search warrant in that situation, and they needed to apprehend the person responsible for the actual distribution, and justified under the exigent exception to the warrant requirements, Your Honor.

THE COURT: Okay. Anything else, Mr. Harmon?

MR. HARMON: Just these things, Your Honor. If the State is basing this on the exigent circumstances, they can find that the drugs would be lost, and that means that they could go in right away. And we need to bear in mind that this matter had taken approximately 12 hours already. The first contact that they had from the confidential informant comes around 11:00 in the morning. And it's not until 10:00 at [11] night that they – they had the confidential informant with them for at least two hours prior to this time, and maybe three. The magistrates were available here in Fillmore, and not only that, the telephonic search warrant opportunity was available.

In addition to that, the home was under surveillance. If people came there and entered the home and left and they suspected that they had drugs, every one of them could have been immediately taken into custody and questioned and searched with regard to what had happened there. And whether or not the drugs would be destroyed would be a question of whether or not the confidential informant had caused some problems inside the home. They are saying he

didn't cause any problems in the home, didn't tip them off.

But on the other hand, I don't think we can tell what he really did do while he was in the home, other than from his own testimony now. But what we have to look at is what the officers had to work with at the time that they entered the home without permission and by force and without a warrant. And we think at that point when they went into the porch that they did not have sufficient legal cause that would rise to the point where Mr. Callahan's rights would be free from illegal search and seizure had been overcome.

THE COURT: My analysis of the situation is whether I think that your basis is good with respect to their ability to [12] get a search warrant. My analysis of it is whether they had probable cause to make an arrest for distribution of a controlled substances. This is in the – I would think in the area of – where we have a wire on the individual, and the officers are monitoring what took place, is whether they had sufficient information, but based upon what they heard that a felony was committed within their presence. And I would have to be the first to admit that the recording of that transaction is very difficult to understand what's going on.

But from my listening to it, there's clearly some discussion of where's the stuff. And the thing that finalized it for me was that the predetermined statement that was arranged between the officers and their CI, Mr. Bartholomew, as to when the transaction had

been completed, was that he would say – make some comment that he wanted to play the drums.

That was the basis on which the officers – the predetermined code word as to that the transaction had been completed. Based upon their listening to what went on and the CI making that determination, the Court finds that they had reason to believe that a felony had been committed in their presence, and. therefore, they can make a warrantless arrest of the individuals. The warrantless arrest was made within the interior of a house, but the Court finds that the exigent circumstances with respect to drug transactions would have [13] made that appropriate without going and obtaining an arrest warrant and also to protect their CI.

And, therefore, the Court finds that their entry to the house was made for the basis of making a felony arrest which they had probable cause. Thereafter their search of the house was made. There's nothing to contradict that Mr. Callahan voluntarily gave his consent to search the remainder of the house. If he hadn't done so, I think they would have only been able to search the area in which the arrest was made pursuant to their right to make a search incident to arrest.

But there's nothing before the Court to indicate that the consent given by Mr. Callahan was anything but voluntarily and knowing, therefore, the Court finds and denies the motion to suppress.

* * *

[34] (A recess for lunch was taken.)

(The following proceedings were held in open court out of the presence of the jury:)

THE COURT: Okay. We'll return to the case of State of Utah v. Afton D. Callahan. It's been indicated to the Court that Mr. Callahan's plea agreement has been reached where Mr. Callahan will plead guilty to Count Three, charging him with the first degree felony of distribution of methamphetamine within a drug-free zone; is that correct, Mr. Harmon?

MR. HARMON: It is, Your Honor.

THE COURT: The other charges would be dismissed, and that this plea is taken subject to Mr. Callahan's right to appeal, assuming it's – the decision with respect to the suppression issue?

MR. HARMON: Yes. Or any matters, but that's the critical question is the suppression. And with regard to that, for the purpose of the record, I've promised him that I will vigorously pursue that. I'm working with Mr. Slavens and Mr. Sidwell on those matters because it will be Mr. Slavens' office that will be paying for the transcript, as I understand it. I already know how many pages the transcript should be, so I think we're moving forward in Mr. Callahan's benefit in that. He was concerned about that, wanted to put that on the [35] record.

THE COURT: Okay. Mr. Anderson, is that your agreement?

MR. ANDERSON: Yes, Your Honor.

THE COURT: And, Mr. Harmon, you indicated that you were – some items, some photographs that had not been received previously; is that correct?

MR. HARMON: Yes. There's Exhibits 19 through 28 that we'd like to offer now, Your Honor.

THE COURT: And they had been discussed by various witnesses.

MR. HARMON: They have.

THE COURT: Any objections, Mr. Anderson?

MR. ANDERSON: No, Your Honor.

THE COURT: They are received.

(Defendant's Exhibit Nos. 19-23 and 25-28 Were received into evidence.)

MR. HARMON: I'll give those to the clerk now.

THE COURT: Mr. Callahan, it's been represented that the plea agreement is that you plead guilty to Count Three, the first degree felony of distribution of methamphetamine within a drug-free zone, is that your understanding, subject to the other terms that you would have the right to appeal the decisions of the Court that have been involved in this trial; [36] is that correct?

THE DEFENDANT: That is correct as far as my understanding is.

THE COURT: That the other charges against you would be dismissed?

THE DEFENDANT: That is correct.

THE COURT: Have you had a full opportunity to review this matter with your attorney, Mr. Harmon?

THE DEFENDANT: I believe so, Your Honor.

THE COURT: Do you have any questions of him or the Court prior to the entry of the plea?

THE DEFENDANT: Now, when we say that I have the right to appeal, that is the right to appeal this before you as well as the Supreme Court?

THE COURT: Not me. You would have the right to appeal the decisions of this Court, that I have made in this trial and previously to the Supreme Court.

THE DEFENDANT: Okay.

THE COURT: I will go through a formal arraignment with you. Is Afton Dale Callahan your true and correct name?

THE DEFENDANT: Yes, sir, it is.

THE COURT: Do you read, speak, and understand the English language?

THE DEFENDANT: Yes, sir. I do.

THE COURT: What level of schooling have you reached?

[37] THE DEFENDANT: Two years of college.

THE COURT: Are you presently under the influence of any alcohol or drug that would affect your ability to give a voluntary plea here today?

THE DEFENDANT: No, sir. I'm not.

THE COURT: Are you presently being treated for any medical or mental condition that would affect your ability to give a voluntary plea?

THE DEFENDANT: No, sir. I'm not.

THE COURT: You have certain constitutional rights the Court is going to review those with you. You understand you are presumed to be innocent until proven guilty?

THE DEFENDANT: Yes, sir. I do.

THE COURT: If this matter went to trial, which it has been the last two and a half days, the would have the right to have to State prove each of the elements of this particular crime beyond a reasonable doubt to a jury of eight individuals, and you understand that right?

THE DEFENDANT: Yes, sir. I do.

THE COURT: And do you waive that right?

THE DEFENDANT: Haven't we already had that?

THE COURT: Well, we haven't come to the conclusion. We have a jury in the jury room, and –

THE DEFENDANT: Yes, sir. I understand that.

THE COURT: And by your entry of a plea, you are [38] waiving your right to have that jury make a decision.

THE DEFENDANT: Yes, sir. I understand that.

THE COURT: Do you waive that right?

THE DEFENDANT: Yes, sir. I do.

THE COURT: You have the right to confront the witnesses against you, which has also occurred during this two and a half day trial, and you have the right to subpoena witnesses on your own behalf, and in your own defense, which you have also done. By entering a guilty plea, you waive any further of those rights, you understand those rights?

THE DEFENDANT: Yes, sir. I do.

THE COURT: Do you waive those rights?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right against self-incrimination, which means you cannot be compelled or forced to give evidence against yourself or to testify against yourself. By entering a plea of guilty, that's what you are doing. You are admitting you are guilty of this particular crime. Do you understand your right against self-incrimination?

THE DEFENDANT: Yes, sir. I do.

THE COURT: Do you waive that right?

THE DEFENDANT: Yes, sir.

THE COURT: If you were convicted by the jury, you would have the right to appeal that conviction. This plea is [39] being taken subject to your right to appeal the decisions of this Court with respect to evidentiary matters. But you do not have the right to appeal the conviction, because once you enter your plea, this Court will enter a conviction for this particular charge.

Do you understand that although you are reserving your right to appeal the decisions of this Court with respect to evidentiary matters, you are not reserving the right to appeal that – the fact that you are convicted of this particular crime? You understand that?

THE DEFENDANT: I'm not real sure on how that works. Am I saying that I'm not going to appeal that on the basis that maybe there was an illegal search and seizure or that the evidence obtained was obtained illegal?

THE COURT: That's what you are reserving the right to appeal.

THE DEFENDANT: In both of them instances?

THE COURT: Yes.

THE DEFENDANT: I'm just not reserving the right to appeal this on the fact that you have said these are the charges and I'm saying that I was guilty?

THE COURT: Right. By having a guilty plea, you are admitting that you did the act, you committed the elements of this particular crime, but you are reserving the right to contest that the evidence obtained against you was obtained [40] illegally; do you understand that?

THE DEFENDANT: Yeah, I understand that.

(Counsel confers off the record with client.)

THE DEFENDANT: I understand, Your Honor. Can I clarify this? What I've just talked to my attorney about is the fact that I am entering into a plea saying that I did commit these – or this crime, but the reason I'm doing this is and having this plea is because the Courts have offered me – or the district attorney has offered me a plea bargain.

THE COURT: Okay. Well, you are going to be – you understand, though, that I'm going to ask you in a few minutes are you guilty or not guilty of

this particular crime. And you are going to have – anticipated you are going to plead guilty; do you understand that?

MR. HARMON: He understands that, Your Honor. I think what he's saying is that part of the inducement for this plea is the bargain that he's receiving.

THE COURT: No question about that. So you waive your right to appeal your conviction other than the things we've discussed; is that correct?

THE DEFENDANT: That's correct.

THE COURT: You understand that this is a first degree felony, it has a potential maximum penalty of confinement in the State Prison for a period not less than five years which could be for your life, and/or a fine up to [41] $10,000. Do you understand the maximum penalties associated with this crime?

THE DEFENDANT: Yes, I do.

THE COURT: Other than the agreement to dismiss Counts One and Two, and the agreement that you may appeal the evidentiary issues with respect to search and seizures and unlawful arrest, have there been made any other promises to induce you to enter this plea here today?

THE DEFENDANT: No, Your Honor. There isn't.

THE COURT: Have there been any threats made against you to induce you to enter this plea?

THE DEFENDANT: No, Your Honor.

THE COURT: This plea is your free and voluntary act?

THE DEFENDANT: Yes, Your Honor. It is.

THE COURT: Mr. Harmon, you have gone over this with Mr. Callahan. You think it's in his best interest to enter this plea subject to those conditions?

MR. HARMON: I do.

(Counsel confers off the record with client.)

THE COURT: You understand that the elements of the crime are that on about March the 19th of this year in Millard County that you did intentionally and knowingly distribute methamphetamine and that distribution took place within a thousand feet of a church. You understand the elements of the crime?

[42] THE DEFENDANT: Yes, I do.

THE COURT: To the first degree felony of distribution of methamphetamine within a drug-free zone, what is your plea?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: The Court has heard the evidence that has been introduced at this trial. The Court finds there is evidence to the effect that the defendant, Afton Callahan, did distribute methamphetamine on March the 19th within Millard County

with a thousand feet of the Catholic church here in Fillmore.

The Court, therefore, finds that there is a factual basis for the charge, finds that Mr. Callahan has entered his plea voluntarily, knowingly, with a full understanding of his constitutional rights.

Okay. Let's bring in the jury and we'll dismiss the jury.

* * *

BEST AVAILABLE COPY

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IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT

IN AND FOR MILLARD COUNTY,
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. AFTON DALE CALLAHAN, DOB – xx/xx/xx Defendant.	: JUDGMENT, : SENTENCE, AND : COMMITMENT TO THE : UTAH STATE PRISON : #02-1700044 FS : : Judge Donald J. Eyre : : (Filed Sep. 27, 2002)

A Third Amended Information was filed herein charging the above Defendant with the following crime(s):

COUNT #1 – POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) WITH INTENT TO DISTRIBUTE/A First Degree Felony
In that the Defendant, as a party to the crime pursuant to U.C.A.§76-2-202, in concert with two or more persons pursuant to U.C.A.§76-3-203.1, did knowingly and intentionally, unlawfully possess a controlled substance, to wit; methamphetamine, with the

intent to distribute in violation of U.C.A.§58-37-8(1)(a)(ii) and did so within 1000 feet of a church in violation of U.C.A.§58-37-8(4)(a)(ix) and (x), a First Degree Felony and upon conviction, the Defendant is subject to serve an indeterminate term of imprisonment for not less than nine (9) years and which may be for life pursuant to U.C.A.§76-3-202.1(3)(e) and imposition or execution of the sentence may not be suspended nor is the Defendant eligible for probation pursuant to U.C.A.§58-37-8(4)(b).

COUNT #2 – POSSESSION OF DRUG PARAPHERNALIA/A Third Degree Felony
In that the Defendant, as a party to the crime pursuant to U.C.A.§76-2-202, in concert with two or more persons pursuant to U.C.A.§76-3-203.1, did unlawfully possess, with intent to use, drug paraphernalia in violation of U.C.A.§58-37a-5, enhanced to a Third Degree Felony pursuant to the provisions of U.C.A.§76-3-203.1 and §58-37-8(4)(c) in that he did so within 1000 feet of a church in violation of U.C.A.§58-37-8(4)(a)(ix) and (x) and punishable by an indeterminate term of imprisonment of not more than five (5) years.

COUNT #3 – DISTRIBUTION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE)/A First Degree Felony
In that the Defendant, in concert with two or more persons pursuant to U.C.A.§76-3-203.1, did knowingly and intentionally distribute or agree, consent, offer or arrange to distribute a controlled substance, to wit; methamphetamine in violation of U.C.A.§58-37-8(1)(a)(ii) and did so within 1000 feet of a church in violation of U.C.A.§58-37-8(4)(a)(ix) and (x), a First Degree Felony and upon conviction, the Defendant is

subject to an indeterminate term of imprisonment of not less than nine (9) years and which may be for life pursuant to U.C.A.§76-3-203.1 and further, that imposition of sentence or execution of the sentence may not be suspended and the Defendant is not eligible for probation pursuant to U.C.A.§58-37-8(4)(b).

This case came on before the above-entitled Court on the 5th of August, 2002 for jury trial following Defendant's arraignment and entry of a not guilty plea. Dexter L. Anderson, Millard County Chief Deputy Attorney, was present representing the State and the Defendant was present together with his Counsel, Milton T. Harmon. After two days of jury trial, the parties advised the Court the Defendant had elected to enter into a plea arrangement, to wit; the Defendant would enter a plea of guilty to Count #3 without the "gang enhancement" pursuant to U.C.A.§76-3-203.1. The Court approved said arrangement and arraigned the Defendant on Count #3, a First Degree Felony of Distribution of Methamphetamine (in a drug-free zone) and advised the Defendant of his constitutional rights. The Defendant entered a plea of guilty and his Counsel affirmed to the Court that he had discussed the matter with the Defendant and was confident the Defendant understood his rights and the consequences of his guilty plea. The Court, having heard more than two days of trial testimony, found a factual basis for said guilty plea. Upon the Motion of the State, the Court dismissed the remaining two (2) counts. The Court ordered a presentence report from the Utah State

Department of Adult Probation and Parole prior to imposition of sentence.

This case came on for sentencing on the 26th of September, 2002 and Brent G. Berkley, Millard County Deputy Attorney, was present representing the State and the Defendant was present together with his Counsel, Milton T. Harmon. The Court and both parties had received and reviewed the Presentence Report submitted by the Department of Adult Probation and Parole. The Court granted the Defendant an opportunity to make a statement in mitigation prior to imposition of sentence. After reviewing the file in its entirety, the Court now makes and enters the following Judgment, Sentence and Commitment to the Utah State Prison.

JUDGMENT

IT IS HEREBY FOUND that the Defendant, AFTON DALE CALLAHAN, is guilty of a First Degree Felony of Distribution of a Controlled Substance (Methamphetamine) in a Drug Free Zone in violation of Section 58-37-8, Utah Code Annotated, 2001.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, AFTON DALE CALLAHAN, serve an indeterminate term of incarceration in the Utah State Prison of not

less than FIVE (5) YEARS and which may be for the LIFE of the Defendant.

The Court finding the Defendant was on parole at the time of the instant offense, hereby orders the above-imposed sentence to be *consecutively* with any other prison commitment.

DATED this 26th day of September.

[SEAL] /s/ Donald J. Eyre
Donald J. Eyre
DISTRICT COURT JUDGE

COMMITMENT

IT IS HEREBY ORDERED that the Utah State Division of Corrections take the Defendant, AFTON DALE CALLAHAN, into their custody and incarcerate him in the Utah State Prison, there to be kept and confined in accordance with the above-imposed Judgment and Sentence.

DATED this 26th day of September, 2002.

[SEAL] /s/ Donald J. Eyre
Donald J. Eyre
DISTRICT COURT JUDGE

STATE OF UTAH)
) ss.
County of Millard)

I, Norma Brunson, Clerk of the Fourth District Court of Millard County, Utah, do hereby certify that

the Honorable Donald J. Eyre, whose name is subscribed to the preceding JUDGMENT, SENTENCE, AND COMMITMENT TO THE UTAH STATE PRISON is a District Judge, duly commissioned and qualified and that the signature of said Judge to said JUDGMENT, SENTENCE, AND COMMITMENT TO THE UTAH STATE PRISON is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court this 26 day of September, 2002.

[SEAL] /s/ Norma Brunson
Norma Brunson
Deputy/Court Clerk

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IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT

IN AND FOR MILLARD COUNTY,
STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. AFTON DALE CALLAHAN, DOB – xx/xx/xx Defendant.	JUDGMENT, SENTENCE, AND COMMITMENT TO THE UTAH STATE PRISON *TUNC PRO NUNC* [sic] #02-1700044 FS Judge Donald J. Eyre (Filed Feb. 6, 2003)

This matter was before the Court on the 7th of August, 2002 and Dexter L. Anderson, Millard County Deputy Attorney, was present representing the State and the Defendant was present together with his attorney, Milton T. Harmon. Pursuant to a Court-approved plea negotiation, the Defendant entered a plea of guilty to the following crime:

DISTRIBUTION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) IN A DRUG FREE ZONE/A First Degree Felony

In that the Defendant did knowingly and intentionally distribute or agree, consent offer or arrange to distribute a controlled substance, to wit; methamphetamine in violation of U.C.A.§58-37-8(1)(a)(ii) and did so within 1000 feet of a church in violation of U.C.A.§58-37-8(4)(a)(ix) and (x), a First Degree Felony.

This matter came on for sentencing on the 26th of September, 2002 and Brent G. Berkley, Millard County Deputy Attorney was present on behalf of the State and the Defendant was present together with his Counsel, Milton T. Harmon. The Court and both parties had received and reviewed the Presentence Report submitted by the Department of Adult Probation and Parole. The Defendant was granted the opportunity to make a statement in mitigation. After reviewing the file, the Court imposed the statutory sentence of an indeterminate prison sentence of not less than five (5) years and which may be for the life of the Defendant.

On the 22nd of January, 2003, the Court granted Defendant's post conviction Petition for Extraordinary Relief and vacated the Judgment and Sentence entered in this matter on the 26th of September, 2002. The basis for the Petition was to allow the Defendant an opportunity to exercise his constitutional right to appeal which the record clearly indicated Defendant desired to do. However, miscommunication between his Counsel resulted in effectively denying Defendant's right to appeal because of procedural limitations.

The Court now hereby makes and enters the following new Judgment, Sentence and Commitment to the Utah State Prison.

JUDGMENT

IT IS HEREBY FOUND that the Defendant, AFTON DALE CALLAHAN, is guilty of a First Degree Felony of Distribution of a Controlled Substance (Methamphetamine) in a Drug Free Zone in violation of Section 58-37-8, Utah Code Annotated, 2001.

SENTENCE

IT IS HEREBY ORDERED that the Defendant, AFTON DALE CALLAHAN, serve an indeterminate term of incarceration in the Utah State Prison of not less than FIVE (5) YEARS and which may be of the LIFE of the Defendant. The Defendant is to receive credit for any time heretofore served in this matter.

The Court finding the defendant was on parole at the time of the instant offense, hereby orders the above-imposed sentence to be *CONSECUTIVELY* with any other prison commitment pursuant to U.C.A.§76-3-401(3).

DATED this 4th day of ~~January~~ Feb., 2003.

[SEAL] /s/ Donald J. Eyre
DONALD J. EYRE
District Court Judge

COMMITMENT

IT IS HEREBY ORDERED that the Utah State Division of Corrections take the Defendant, AFTON DALE CALLAHAN, into their custody and incarcerate him in the Utah State Prison, there to be kept and confined in accordance with the above-imposed Judgment and Sentence.

DATED this 4th day of ~~January~~ Feb., 2003.

[SEAL] /s/ Donald J. Eyre
DONALD J. EYRE
District Court Judge

STATE OF UTAH)
) ss.
County of Millard)

I, Norma Brunson, Clerk of the Fourth District Court of Millard County, Utah, do hereby certify that the Honorable Donald J. Eyre, whose name is subscribed to the preceding JUDGMENT, SENTENCE, AND COMMITMENT TO THE UTAH STATE PRISON is a District Judge, duly commissioned and qualified and that the signature of said Judge to said JUDGMENT, SENTENCE. AND COMMITMENT TO THE UTAH STATE PRISON is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Court this 4 day of ~~January~~ February, 2003.

[SEAL] /s/ Norma Brunson
Norma Brunson
Deputy/Court Clerk

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IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
IN AND FOR MILLARD COUNTY,
STATE OF UTAH

	: FINDINGS OF FACT
	: AND CONCLUSIONS
	: OF LAW
STATE OF UTAH,	: ORDER GRANTING
Plaintiff,	: EXTRAORDINARY
	: RELIEF
vs.	: (JUDGMENT VACATED)
AFTON DALE CALLAHAN,	: #02-1700044 FS
Defendant.	: Judge Donald J. Eyre
	(Filed Feb. 6, 2003)

This case came before the Court on the 22nd of January, 2003 for hearing on Defendant's Motion for Re-sentencing. Dexter L. Anderson, Millard County Chief Deputy Attorney, was present representing the State and the Defendant was present together with his Counsel, James K. Slavens. Counsel for the Defendant moved the Court to amend his previously filed Motion to include a Petition for Extraordinary

Writ to which the Court agreed. The State objected to Defendant's Motion on procedural grounds. The Court had reviewed the pleadings of the parties and considered their arguments and now makes and enters the following Findings of Fact and Conclusions of Law, and Order Granting Defendant's Petition for Extraordinary Relief.

FINDINGS OF FACT

1. That following preliminary hearing in this matter, the Defendant was charged with the following crimes:

COUNT #1 – POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) WITH THE INTENT TO DISTRIBUTE/A First Degree Felony in violation of U.C.A.§58-37-8.

COUNT #2 – POSSESSION OF DRUG PARAPHERNALIA/A Third Degree Felony in violation of U.C.A.§58-37a-5.

COUNT #3 – DISTRIBUTION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) IN A DRUG FREE ZONE/A First Degree Felony in violation of U.C.A.§58-37-8.

2. That initially the Defendant was represented by James K. Slavens, the Millard County Public Defender but because of a conflict at that time, Defendant's representation was taken over by Milton T. Harmon (with the approval of the Defendant).

3. That the Defendant subsequently filed a Motion to Suppress for which evidentiary hearing was held by the Court on the 23rd of May, 2002. Following that hearing, the Court denied Defendant's Motion to Suppress evidence finding the issues raised were not of a legal nature but were questions of fact and therefore strictly subject to the purview of the jury.

4. That this case came on for jury trial on the 5th of August, 2002.

5. That after two days of trial, the Defendant elected to accept a plea negotiation offered by the State. On the 7th of August, 2002, Mr. Callahan entered a plea of guilty to a First Degree Felony of Distribution of a Controlled Substance, Methamphetamine, in a Drug Free Zone. As part of the plea negotiation, the Defendant specifically preserved the issues raised in his Motion to Suppress for appeal.

6. That on the 26th of September, 2002 following preparation of a presentence report by the Department of Adult Probation and Parole, the Defendant was sentenced to an indeterminate term of incarceration in the Utah State Prison of not less than Five (5) Years and which may be for the Life of the Defendant. Entry of Judgment and Sentence was signed that same date by the Court.

7. That on the 27th of November, 2002, Milton T. Harmon, Defendant's trial counsel, filed a Notice of Withdrawal.

8. That on the 4th of December, 2002, James K. Slavens, filed a Notice of Appeal on behalf of the Defendant. Mr. Slavens was notified by the Clerk of the Supreme Court that said appeal was not timely and proceedings to dismiss the appeal would commence sua sponte.

9. That on the 13th of January, 2003, Mr. Slavens filed a "Motion for Re-sentencing" supported by an Affidavit executed by himself and Milton T. Harmon. The parties stated in their Affidavit "(t)here was a miscommunication between Mr. Harmon and Mr. Slavens who would actually file the appeal".

10. That on the 14th of January, 2003, the State filed an Objection to Defendant's Motion for Re-sentencing claiming the pleading was procedurally incorrect and as filed, the District Court had no jurisdiction.

11. That during the evidentiary hearing on the 22nd of January, 2003, Mr. Slavens moved the Court to include a petition for an extraordinary writ as part of his previously filed pleading.

12. That the State still objected to Defendant's Motion/Petition based on procedural grounds.

13. That the Court noted the record very clearly indicated Defendant's intent to appeal this case, i.e., the reserved suppression issue and that both parties were aware of his intentions.

CONCLUSIONS OF LAW

1. That pursuant to *State v. Rees, 464 Utah Adv. Rep. 31,* the Court will treat Defendant's pleading in this matter as a Post Conviction Petition for Writ of Error *Coram Nobis* which this Court has jurisdiction to consider.

2. That the Defendant, AFTON DALE CALLAHAN, has a constitutional right to appeal this matter, more specifically the issues raised in the Motion to Suppress filed in the case in chief and preserved for appeal upon entry of Defendant's guilty plea.

3. That because of a miscommunication between his Counsel, the traditional avenue of appeal became impossible when neither Counsel filed a timely notice of appeal, an error unknown to Mr. Callahan and certainly through no fault of his own.

4. That "*corum nobis* is available in 'limited circumstances, to modify or vacate a judgement where extra-record facts show that the Defendant has been deprived of his constitutional right to a fair trial or meaningful appeal.'" *State v. Rees 464 Utah Adv. Rep. 31; Johnson 635 P.2d at 38.*

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law and in the interests of justice, the Court hereby grants Defendant's Petition for Extraordinary Relief and hereby vacates the original Judgment and Sentence entered in this case on the 26th of September, 2003.

DATED this 4th day of ~~January~~ Feb, 2003.

[SEAL] /s/ Donald J. Eyre
Donald J. Eyre
DISTRICT COURT JUDGE

[Certificate Of Service Omitted In Printing]

93 P.3d 103

STATE of Utah, Plaintiff and Appellee,

v.

Afton Dale CALLAHAN,
Defendant and Appellant.

No. 20030128-CA.

Court of Appeals of Utah.

May 13, 2004.

James K. Slavens, James K. Slavens Esq, Fillmore, for Appellant.

Mark L. Shurtleff, atty. gen., and Joanne C. Slotnik, asst. atty. gen., Salt Lake City, for Appellee.

Before Judges JACKSON, ORME, and THORNE, Jr.

OPINION

THORNE, Jr., Judge:

¶ 1 Afton Callahan appeals from the trial court's denial of his motion to suppress and his subsequent conditional guilty plea to distributing a controlled substance in a drug free zone, a first degree felony, in violation of Utah Code Annotated section 58-37-8 (2002). We reverse.

BACKGROUND

¶ 2 The Central Utah Narcotics Task Force (Task Force) is charged with the responsibility of investigating drug crimes in central Utah and is comprised of five officers and an intelligence official. The Task Force relies on confidential informants to further their investigations. At 11:00 a.m. on the morning of March 19, 2002, a confidential informant (CI) informed Task Force Officer Jeff Whatcott that Afton Callahan would, later that day, have methamphetamine to sell. Whatcott told the CI to keep him informed and the CI promised to do so. The CI left work at about 5:00 p.m. without having talked to Callahan and having nothing to relate to Whatcott. After leaving work, the CI purchased some beer and spent the next two hours drinking. The CI then visited Callahan's home where he determined that methamphetamine was available, and, after ingesting a sample, he made arrangements to make a purchase later that night. The CI left Callahan's and contacted Whatcott. The CI told Whatcott that he had arranged a buy. Whatcott told the CI that they needed to meet immediately. At 9:00 p.m. Whatcott, along with several other Task Force members, met with the CI. There they discovered that the CI had been drinking. Consequently, Whatcott monitored the CI and plied him with "several cups of coffee" to ensure that the CI was "competent enough to do the job." They were not, however, aware that he had consumed methamphetamine prior to the meeting.

¶ 3 When Whatcott finally concluded that the CI was sober enough to perform his function, he searched the CI and gave him a transmitter, through which the Task Force intended to listen to the transaction. Whatcott also gave the CI a one-hundred-dollar bill to complete the buy, told him to give the prearranged signal when the sale was complete, and sent him into Callahan's residence. After the CI entered the home, the Task Force officers monitored the transaction. Although the transmission was unclear, the officers felt confident that drugs had been discussed, and when they heard the CI utter the prearranged signal that the buy was complete the Task Force rushed into the home. Without consent, the officers entered through a wooden door that led to an enclosed porch. On the porch they found the CI, Callahan, and a third man.[1] The men were placed on the ground, searched, and restrained. The Task Force officers found a packet containing methamphetamine in the CI's pocket, but they found nothing on the other men. However, on the floor of the enclosed porch, they did find a baggie that contained four or five smaller baggies, each of which contained a white powder that was consistent with methamphetamine. The officers then obtained Callahan's consent to search the home. The subsequent search disclosed

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[1] Soon after entering the home, the officers also discovered a fourth man, whom they then detained, searched, and restrained. We need not discuss the identities or dispositions of the other men found in the home as they are not material to this case.

paraphernalia but no additional narcotics. Consequently, Callahan was arrested and charged with possession of a controlled substance with intent to distribute, distribution of a controlled substance, and possession of drug paraphernalia.

¶ 4 Callahan filed a motion to suppress the evidence, which the trial court initially denied, but the court also indicated a willingness to later revisit the issue. As the trial neared its conclusion, Callahan renewed his motion to suppress. The State responded that the warrantless entry into the home was justified by exigent circumstances. The trial court agreed with the State and denied Callahan's motion. Following the trial court's decision, Callahan entered into a conditional plea agreement with the State, reserving the right to contest the trial court's evidentiary ruling. He now appeals the trial court's suppression order.

ISSUE AND STANDARD OF REVIEW

¶ 5 Callahan argues that the trial court erred in denying his motion to suppress the evidence. "In reviewing a trial court's ruling on a motion to suppress evidence, we will not overturn its factual findings absent clear error. The trial court's legal conclusions, however, we review for correctness." *State v. Valenzuela*, 2001 UT App 332,¶ 8, 37 P.3d 260 (quotations, citations, and alteration omitted).

ANALYSIS

¶ 6 Callahan argues that the trial court erred when it determined that the Task Force officers' entry into his home without a warrant was justified due to the exigent circumstances that existed at the time of their entry. "[W]arrantless searches and seizures within a home or other private premises are per se unreasonable absent exigent circumstances" and probable cause. *State v. Beavers*, 859 P.2d 9, 13-14 (Utah Ct.App.1993). An officer is faced with exigent circumstances when a reasonable person in the officer's shoes would "'believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect,'" or to prevent the improper frustration of legitimate law enforcement efforts. *Id.* at 18 (quoting *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir.1984)).

¶ 7 Here, the State concedes that the trial court erred in finding that the entry was justified by exigent circumstances.[2] However, although it concedes

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[2] In essence, the trial court determined that the presence of narcotics, or the possibility of additional drug sales, created an exigent circumstance that justified the Task Force's entry into the home. The court found no threat to person or evidence, and nothing in the record suggests that Callahan knew, or had reason to suspect, that he was being monitored by any police agency. Consequently, the Task Force entry was not justified under the doctrine of exigent circumstances. *See United States v. Radka*, 904 F.2d 357, 362 (6th Cir.1990) ("A warrantless entry to prevent the loss or destruction of evidence is justified, if the

(Continued on following page)

that the trial court erred in one respect, the State offers an alternative theory to affirm the trial court's ruling.

¶ 8 The State, for the first time on appeal, argues that the Task Force officers inevitably would have discovered the evidence found in the CI's pocket based upon their routine and standard police practices. "The exclusionary rule prohibits the use at trial of evidence, both primary and derivative (the 'fruit of unlawful police conduct'), obtained in violation of an individual's constitutional and statutory rights." *State v. Topanotes*, 2003 UT 30,¶ 13, 76 P.3d 1159 (citation omitted). The principle purpose of the exclusionary rule is to deter unlawful police conduct through denial of the use of evidence obtained through the unlawful behavior. *See id.* However, "'[i]f the prosecution can establish by a preponderance of the evidence that the [evidence] ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that

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government demonstrates: (1) a reasonable belief that third parties are inside the dwelling; and (2) a reasonable belief that the loss or destruction of evidence is imminent. The mere possibility of loss or destruction of evidence is insufficient justification. Affirmative proof of the likelihood of the destruction of evidence, along with the necessity for warrantless entry are required." (citations omitted)).

We commend the State for its careful review and its decision to concede the exigent circumstance issue. We further note that such concessions reflect the duty of prosecutors not simply to serve as advocates, but also to serve as guardians of the community justice system.

the evidence should be received.'" *Id.* at ¶ 14 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984)). In Utah, " 'an entirely independent, alternate, intervening, appreciably attenuated investigation aside from the tainted investigation,' is not required to prove inevitable discovery." *Id.* at ¶ 15 (quoting *State v. James*, 2000 UT 80,¶¶ 15-16, 13 P.3d 576). However, "[f]or courts confidently to predict what *would* have occurred, but did not actually occur, there must be persuasive evidence of events or circumstances *apart from* those resulting in illegal police activity that would have inevitably led to discovery." *Id.* at ¶ 16 (emphases added).

> It is well settled that an appellate court may affirm the judgment appealed from "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court."

Id. at ¶ 9 (quoting *Bailey v. Bayles*, 2002 UT 58,¶ 10, 52 P.3d 1158). However, "[a]lternative grounds for affirmance that are raised for the first time on appeal must be supported and sustained by the record and the factual findings of the court." *Id.* at ¶ 22.

¶ 9 In *Topanotes*, the supreme court stated that "[r]outine or standard police procedures are often a compelling and reliable foundation for inevitable discovery, even if not part of a separate, concurrent investigation." *Id.* at ¶ 17. However, for the evidence to be admissible when only one investigative action is involved, a court must find that the investigation "would have developed an independent, *legal* avenue for discovery of the evidence in question." *Id.* (emphasis added). The State suggests that the present situation fits well within this model. In effect, the State argues that had the Task Force not illegally entered and searched Callahan's home, as well as all of the people in the home, the CI would have left the home and presented the Task Force with the methamphetamine. As enticing as the State's argument might be, as clearly stated in *Topanotes*, "the argument that '"if we hadn't done it wrong, we would have done it right,"' is far from compelling." *Id.* at ¶ 19 (citations omitted). Accepting the State's position would leave us ignoring not only the Task Force's illegal search, but also the fact that the Task Force's illegal entry was planned from the start. We cannot ignore these facts, and in light of the Task Force's plan, the only inevitability that we can detect is the Task Force's illegal entry following the CI's signal that the drug buy was complete.

¶ 10 Moreover, although the State urges us to rely on routine or standard police procedure in examining this issue, in the face of the Task Force's planned illegality, we are loath to do so. Our role, in

evaluating the State's argument, is to determine whether the investigation "would have developed an independent, *legal* avenue for discovery of the evidence in question." *Id.* at ¶ 17 (emphasis added). In view of the Task Force's adoption of a plan that included an illegal entry from the outset, we cannot, with any confidence, conclude that an "independent, legal avenue for discovery" was *ever* available. *Id.* Nor does the evidence presented at trial support a conclusion that the evidence would have been uncovered through an independent legal avenue. The State adduced no evidence during the trial detailing the normal course of activities that occur after a controlled narcotics buy is complete. Furthermore, even assuming that the State is correct when it asserts that under normal circumstances the CI would have left the home and proffered the methamphetamine to the Task Force officers, nothing about this situation strikes this court as "normal." The CI spent the evening drinking, and at some point during the evening he consumed methamphetamine. When he arrived to prepare for the controlled buy, the Task Force officers quickly became aware that the CI was under the influence of alcohol, and determined that the proper remedy was to ply the CI with "several cups of coffee" and observe him to ensure he was competent. When the officers were satisfied, they wired the CI with a transmitter, told him to signal when the buy was complete, and sent him into Callahan's home. When the CI gave the signal, the Task Force officers, *as planned, and following their own procedures*, burst into Callahan's home and detained

all of the occupants, including the CI. Under these circumstances, it is not possible to conclude that the evidence would have been discovered through "independent legal avenue[s]." *Id.* Therefore, we conclude that the evidence from the CI's pocket is not admissible pursuant to the inevitable discovery doctrine.

CONCLUSION

¶ 11 The trial court erred in justifying the Task Force officers' warrantless entry into Callahan's home under the doctrine of exigent circumstances. Consequently, the evidence discovered during the raid, including the drugs found in the CI's pocket, is not admissible under that doctrine. Nor does the record support admitting the evidence found on the CI under the doctrine of inevitable discovery. The Task Force's adoption of tactics that involve planned illegal entry should not be countenanced, and permitting the use of any evidence found during this situation "would provide no deterrent at all to future unlawful detentions, entries, or searches." *State v. Topanotes,* 2003 UT 30,¶ 19, 76 P.3d 1159. Accordingly, we reverse Callahan's conviction resulting from the trial court's denial of Callahan's motion to suppress, and remand to the trial court with instructions to suppress all of the evidence collected as a result of the Task Force's illegal entry into Callahan's home.

¶ 12 WE CONCUR: NORMAN H. JACKSON, Judge, and GREGORY K. ORME, Judge.

James K. Slavens, Esq.
P.O. Box 752
Fillmore, Utah 84631
Attorney for Plaintiff
435-743-4225

IN THE UNITED STATES DISTRICT COURT
CENTRAL DIVISIONS STATE OF UTAH

AFTON CALLAHAN Plaintiff, vs. MILLARD COUNTY; THE CENTRAL UTAH NARCOTICS TASK FORCE; SEVIER COUNTY; SANPETE COUNTY; PIUTE COUNTY; MT. PLEASANT CITY; WAYNE COUNTY; RICHFIELD CITY; SALINA CITY; GUNNISON CITY; EPHRAIM CITY; CORDELL PEARSON in his official and individual capacity; JEFFREY WHATCOTT, in his official and individual capacity; MARTY GLEAVE, in his official and individual capacity; CLARK THOMAS in his official and individual capacity; DWIGHT JENKINS, in his official and individual capacity; and JOHN DOES I-IX in their official and individual capacities. Defendants.	AMENDED COMPLAINT AND DEMAND JURY TRIAL Case No. 2:04-CV-00952 Judge Paul G. Cassell

COMES NOW Plaintiff, Afton Callahan and for causes of action against Defendants, and alleges as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. This is a civil action seeking damages against Defendants for committing acts under color of state law which deprived Afton Callahan of his rights as secured by the United States Constitution, the Utah Constitution and the laws of the United States. Defendants deprived Plaintiff of his rights against unlawful searches and seizures (including arrests and incarceration), his right to privact [sic], and deprived Plaintiff of his rights against deprivation of liberty without due process (personal security and restraint of bodily movement) thereby depriving Afton Callahan of his rights, privileges and immunities as guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and the Utah Constitution and laws. This action also seeks damages against Defendants for assault and battery, defamation, and the infliction of emotional distress

2. A Notice of Claim, pursuant to the guidelines of the Utah Tort Claims Act was sent to the Defendants pursuant to the Act. A copy of the Notice was attached to the original Complaint as Exhibit "A" and is included herein by this reference as if quoted in full.

3. Afton Callahan is a citizen and resident of the State of Utah and a citizen of the United States.

4. Defendant The Central Utah Narcotics Task Force ("Task Force") is organized pursuant to agreement of various government agencies to act in their behalf under the laws of the State of Utah.

5. Defendant Millard County is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

6. Defendant Wayne County is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

7. Defendant Sevier County is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

8. Defendant Richfield City is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

9. Defendant Sanpete County is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

10. Defendant Salina City is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

11. Defendant Piute County is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

12. Defendant Gunnison City County is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

13. Defendant Mt. Pleasant City is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

14. Defendant Ephraim City is a body corporate and politic of the State of Utah and organized under the laws of the State of Utah.

15. The Cities and Counties identified above shall hereinafter be collectively referred to as "Governmental Entities."

16. Cordell Pearson (hereinafter referred to as "Pearson") is the duly appointed Commander of the Task Force and personally and directly had supervisory duties over the Task Force officers and the other officers involved in the events described herein.

17. Pursuant to the Interlocal Cooperation Act (Utah Code Section 11-13-1), the Defendant Governmental Entities entered into an Intergovernmental Agreement ("Agreement") which created the Task Force. A copy of the Agreement is attached to the Plaintiff's Opposition to the Defendants' Motion for Judgment and by this reference incorporates the agreement as if quoted herein in full.

18. The Governmental Entities authorized the Task Force to act in their behalf in the various jurisdictions.

19. All the Governmental Entities fund the Task Force pursuant to the Agreement.

20. All the Governmental Entities are partners in the creation and supervision of the Task Force.

21. Pearson personally and directly had supervisory obligations regarding the Task Force's policies and procedures.

22. Pearson personally and directly planned, supervised and participated in the events described herein.

23. Jeff Whatcott is a Millard County detective who is assigned to the Task Force and personally and directly planned and assisted in the events described herein.

24. Marty Gleave is the Piute County Sheriff and personally and directly assisted the Task Force in the events described herein.

25. Clark Thomas and Dwight Jenkins were personally and directly involved in the planning and execution of the events described herein.

26. It is unknown what other affiliations that Clark Thomas and Dwight Jenkins may have with any of the named Governmental Entities.

27. Various other officers from the Millard County Sheriff's Department were personally and directly involved in the execution of the events described herein.

28. On information and believe [sic], Sevier County officers were also personally and directly involved in the events described herein.

29. The Agreement provides as follows:

    a. "The Central Utah Narcotics Task Force (hereafter referred to as Task Force), governed by an Executive Board, is hereby created as

an administrative entity for the purpose of investigating and prosecuting the illegal importation, manufacture, use, distribution, and sale of controlled substances under state, federal and local law."

b. Under the Section titled *GOVERNING BOARD* of the Agreement, it provides that the Task Force will be administered by "a governing body comprised of the senior agency administrators."

c. This Governing Board was then to: "select cases to be investigated . . . and provide oversight of project investigations."

d. The Governing Board is to meet regularly to evaluate the progress and address the problems of the operation of the Task Force.

e. The Sevier County Sheriff's Office Secretary was assigned and obligated to prepare and keep the minutes regarding these meetings.

30. The Governmental Entities and the Task Force failed to properly train, instruct and supervise law enforcement personnel on when, how and what manner police officers should be allowed to search and seize resident [sic] and the occupants.

31. On information and believe [sic], the Governmental Entities breached and other wise [sic] failed to perform its duties to supervise and train the law enforcement officers involved with the Task Force.

32. The Governmental Entities and the Task Force failed to set and establish appropriate policies/customs to address issues regarding search

and seizure of the residents and the occupants within the Task Forces' jurisdiction.

33. The Governmental Entities failed to create a "governing body comprised of the senior agency administrators."

34. The Governmental Entities failed to "select cases to be investigated . . . and [to] provide oversight of project investigations."

35. The Governmental Entities failed to meet regularly to evaluate the progress and address the problems of the Task Force.

36. The Governmental Entities failed to prepare and keep minutes of these meetings.

37. The Task Force retained an individual to work as confidential informant for the purpose of setting up "controlled buys" with unsuspecting citizens within the jurisdictional boundaries of the Governmental Entities.

38. Task Force officers, Cordell Pearson, Jeffrey Whatcott, Clark Thomas, Dwight Jenkins, Marty Gleave and various other officers from Millard County, Piute County and possibly Sevier County (hereinafter collectively referred to as "Task Force Officers") under the direction of Cordell Pearson, set up a controlled buy between the confidential informant and Mr. Callahan.

39. On or about March 19, 2002, the Task Force Officers developed a plan to place this confident informant in Afton Callahan's home while wearing a wire.

40. While the confidential informant was in the house, the Task Force Officers conducted surveillance on Afton Callahan's home but could not hear clearly what was being said through the wire.

41. As had been planned from the inception, on cue, the Task Force Officers illegally stormed Afton Callahan's home without a warrant, invaded his home, arrested him and searched the residence.

42. The Task Force Officers' plan and action demonstrates a preconceived decision to violate Mr. Callahan's Constitutional rights from the advent.

43. Afton Callahan spent over two years incarcerated because of this illegal invasion into his home and subsequent arrest and search.

44. The Utah Court of Appeals, on May 13, 2004, found that the actions stated above violated Mr. Callahan's Constitutional rights.

45. The Task Force's violation of Mr. Callahan's Constitutional rights is not an isolated event but has occurred on numerous other occasions within its jurisdictional boundaries.

46. The actions described herein demonstrates [sic] the Defendants' "deliberate indifference" to the rights of the citizens effected by the Task Force's operations.

COUNT I
UNLAWFUL SEARCH AND SEIZURE
ALL DEFENDANTS

47. Plaintiffs hereby incorporate paragraphs 1 through 46 above as if set forth herein in full.

48. The Task Force Officers' (as defined in paragraph 38 above) actions as articulated above constitute unlawful arrest, searches and seizures of Afton Callahan as protected by the Fourth and Fourteenth Amendment to the United States Constitution and protected under 42 U.S.C. § 1983.

49. As to the Governmental Entities and the Task Force, their policies/customs, lack of policies and failures to supervise and train its personnel was a cause of the injuries suffered by the Plaintiff.

50. As a result of this violations of Plaintiffs constitutionally prohibited rights, and his subsequent detention in the Utah State Prison, Plaintiff has been damaged in an amount to be established at trial.

51. Plaintiff is entitled to recover his damages from the Defendants.

COUNT II
RIGHT TO PRIVACY
ALL DEFENDANTS

52. Plaintiff hereby incorporates paragraphs 1 through 51 above as if set forth herein in full.

53. The Task Force Officers' (as defined in paragraph 38 above) actions as articulated above constitute

a violation of Afton Callahan's right to privacy, as guaranteed by the Fourteenth Amendment to the United States Constitution and protected under 42 U.S.C. § 1983.

54. As to the Governmental Entities and the Task Force, their policies/customs, lack of policies and failures to supervise and train its personnel was a cause of the injuries suffered by the Plaintiff.

55. As a result of this violation of Plaintiff's constitutionally prohibited rights, Plaintiff has been damaged in an amount to be established at trial.

56. Plaintiff is entitled to recover his damages from the Defendants.

COUNT III
RIGHT TO PERSONAL SECURITY
ALL DEFENDANTS

57. Plaintiff hereby incorporates paragraphs 1 through 56 above as if set forth herein in full.

58. The Task Force Officers' (as defined in paragraph 38 above) actions as articulated above constitute a violation of Plaintiff's liberty right to personal security, as guaranteed by the United States Constitution and protected under 42 U.S.C. § 1983.

59. As to the Governmental Entities and the Task Force, their policies/customs, lack of policies and failures to supervise and train its personnel was the cause of the injuries suffered by the Plaintiff.

60. As a result of this violation of Plaintiffs constitutionally protected rights, Plaintiff has been damaged in an amount to be established at trial.

61. Plaintiff is entitled to recover his damages from the Defendants.

COUNT IV
WRONGFUL ARREST
ALL DEFENDANTS

62. Plaintiffs hereby incorporate paragraphs 1 through 61 above as if set forth herein in full.

63. The Task Force Officers' (as defined in paragraph 38 above) actions as articulated above constitute a wrongful arrest and/or restraint of bodily movement which amounts to a deprivation of liberty interest without due process.

64. As to Governmental Entities and the Task Force, their policies/customs, lack of policies and failures to supervise and train its personnel was a cause of the injuries suffered by the Plaintiff.

65. As a result, Plaintiff has been damaged in an amount to be established at trial.

66. Plaintiff is entitled to recover his damages from the Defendants.

COUNT V
ASSAULT AND BATTERY
AND WRONGFUL ARREST
CORDELL PEARSON, JEFFREY WHATCOTT,
CLARK THOMAS, MARTY GLEAVE,
AND DWIGHT JENKINS
IN THEIR INDIVIDUAL CAPACITIES

67. Plaintiffs hereby incorporate paragraphs 1 through 66 above as if set forth herein in full.

68. The Task Force Officers' (as defined in paragraph 38 above) actions as articulated above constitute an assault and battery and a wrongful arrest.

69. As a result, Plaintiff has been damaged in an amount to be established at trial.

70. Plaintiff is entitled to recover his damages from the Defendants in this individual capacities.

COUNT VI
DEFAMATION
CORDELL PEARSON. JEFFREY WHATCOTT,
CLARK THOMAS, MARTY GLEAVE,
AND DWIGHT JENKINS
IN THEIR INDIVIDUAL CAPACITIES

71. Plaintiffs hereby incorporate paragraphs 1 through 70 above as if set forth herein in full.

72. The Task Force Officers' (as defined in paragraph 38 above) actions as articulated above constitute defamation of Plaintiff's character.

73. The facts indicated above were published to the public in such a way that it defamed his character.

74. As a result, Plaintiff has been damaged in an amount to be established at trial.

75. Plaintiff is entitled to recover his damages from the Defendants in their individual capacities.

COUNT VII
INFLICTION OF EMOTIONAL DISTRESS
CORDELL PEARSON, JEFFREY WHATCOTT, CLARK THOMAS, MARTY GLEAVE, AND DWIGHT JENKINS
IN THEIR INDIVIDUAL CAPACITIES

76. Plaintiff hereby incorporates paragraphs 1 through 75 above as if set forth herein in full.

77. The Task Force Officers' (as defined in paragraph 38 above) knew, or by exercising reasonable care should have known, that their actions were improper and illegal and would cause Plaintiff a great deal of emotional distress.

78. As a direct and proximate result of their negligent, intentional and/or reckless conduct, Plaintiff has experienced extreme emotional distress and suffered damages in an amount to be established at trial.

79. Plaintiff is entitled to recover his damages from the Defendants in their individual capacities.

COUNT VII
PUNITIVE DAMAGES
ALL DEFENDANTS

80. Plaintiff hereby incorporates the allegations contained in paragraph 1-79 above and further alleges as follows:

81. That the Plaintiff is entitled to punitive damages in that the Defendants' actions were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others in an amount to be established at trial.

82. Plaintiff is entitled to recover his damages from the Defendants.

ATTORNEY'S FEES
ALL DEFENDANTS

In order to prosecute this action, Plaintiff necessarily retained the legal services of the James K. Slavens and has agreed to pay him a reasonable fee for his services. Pursuant to the Civil Rights Attorney Fees Awards Act of 1976, 42 U.S.C. § 1988, and the Utah Rules of Civil Procedure and the Utah Code, he is entitled to recover his attorney's fees from Defendants.

WHEREFORE, Plaintiff prays for damages against Defendants as follows:

1. For the deprivation and abridgment of Plaintiff's civil rights as alleged in Plaintiff's Counts I, II, III and IV, the Plaintiff prays for an award of damages

in such amount as may be determined at trial, plus all lost income and all future economic losses.

2. For the assault and battery alleged in Count V, for Defamation alleged in Count VI, for the infliction of emotional distress as alleged in Plaintiff's Count VII, the Plaintiff prays for an award of damages against the Individual Defendants in their individual capacities in such amount as may be proven at trial.

[3.] For punitive damages as alleged in Count VIII.

4. For Plaintiffs reasonable attorney's fees and costs incurred in prosecuting this action.

5. For all other relief as to the court appears just.

DATED this 14 day of April, 2005.

/s/ James Slavens
James K. Slavens

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of not less than twelve (12) persons as to all issues triable to a jury in this matter.

DATED this 17 day of April, 2005.

/s/ James Slavens
James K. Slavens

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AFTON DALE CALLAHAN, PLAINTIFF.	)	CASE NO. 2:04CV00952PGC
MILLARD COUNTY, ET. AL[ ], DEFENDANT.	)	

DEPOSITION OF AFTON DALE CALLAHAN

TAKEN: JANUARY 5, 2006

Intermountain Court Reporters
5885 Holstein Way
Murray, UT 84107
(801) 263-1396

[2] Deposition of AFTON DALE CALLAHAN, taken on behalf of Defendant, at 215 So. State Street, Salt Lake City, Utah, on January 5, 2006, commencing at 1:30 PM, before LINDA J. SMURTHWAITE, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public in and for the State of Utah, pursuant to Notice.

APPEARANCES

FOR THE PLAINTIFF: JAMES K. SLAVENS, ESQ.
P.O. Box 752
Fillmore, UT 84631

FOR DEFENDANT: STIRBA & ASSOCIATES
BY: MEB ANDERSON, ESQ.
215 So. State Street
Suite 750
SLC, UT 84111

[3] INDEX

WITNESS	EXAMINATION BY	PAGE
Afton Callahan	Mr. Anderson	4

EXHIBITS:

No. 1 Pictures 42

[4] Salt Lake City, Utah, January 5, 2006, 1:30 P.M.

AFTON DALE CALLAHAN

was duly sworn, was examined and testified as follows:

BY MR. ANDERSON:

Q. Could you please state your name and spell it, please.

A. Afton Dale Callahan, A-F-T-O-N, D-A-L-E, C-A-L-L-A-H-A-N.

Q. And would you state your current address for the record.

A. 15 South 100 East.

Q. Where is that?

A. Fillmore, Utah.

Q. And how old are you Mr. Callahan?

A. I am 42.

Q. Would you state your specific birth date, please?

A. September 25th, 1962.

Q. And would you give your social security number.

A. xxx-xx-xxxx.

Q. Mr. Callahan, have you ever had your deposition taken before?

A. Yes.

* * *

[13] **Q.** How many times have you been arrested?

A. Several.

Q. If you would for me, would you please elaborate on each of the times that you've been arrested?

A. I don't think that's possible.

Q. When was the most recent time you were arrested?

A. The time of the incident that we're talking about.

Q. And that was?

A. March 19th, 2002.

Q. Thank you. Do you remember when you were arrested, the time prior to that?

A. It was around Halloween, just prior to that.

Q. And do you remember what you were arrested for on that occasion?

A. I was arrested for – I was arrested for violation of my probation and taken in and charged with supplying alcohol to a minor.

Q. And what was the resolution of those [14] charges?

A. All charges were dropped.

Q. You mentioned that you've been arrested numerous times. Approximately how many of these arrests were for drug charges?

A. I can only think of two other times.

Q. And do you remember the dates of those two times?

A. No, sir.

Q. What types of drugs or charges did those arrests involve?

A. Possession of marijuana.

Q. And with regard, let's say, to the most recent time you were arrested for possession of marijuana, what was the outcome of those charges?

A. I was sent to prison.

Q. Do you remember what the dates of that time you spent in prison were?

A. I don't. I believe they started some time in '98, and I was released in 2000, I believe it was July of 2000.

Q. Do you remember where you were sent to prison?

A. Yes, sir.

Q. Where was that?

[15] **A.** I was sent to the point of the mountain, to the Draper prison.

Q. And with regards to the first time you were arrested for possession of marijuana, what was the outcome of that arrest?

A. The first time I was arrested for possession of marijuana I was – I got a zero to five. It was – they suspended my sentence and gave me probation.

Q. Do you remember approximately when that was in time?

A. Approximately '92.

Q. You mentioned that you spent some time in prison with regards to the first marijuana possession charge. Have you spent –

A. No, sir.

Q. – any other time in jail or prison?

A. That's not correct. The first time I spent time in a county facility under the supervision, and then was given probation through Millard County. It was the second time that I was involved with marijuana that I was sentenced to prison.

Q. Is that the only time that you've been in prison?

A. Yes, sir.

Q. Are there any other –

[16] MR. SLAVENS: Other than the other time he talked about?

MR. ANDERSON: Yes.

MR. SLAVENS: Okay.

MR. ANDERSON: Off the record.

(Whereupon a discussion was held off the record.)

MR. ANDERSON: Back on the record.

Q. So you indicated that you've been in prison one time?

A. Yes, sir.

Q. And how many times have you been in a jail, county jail or city jail?

A. This is before the arrest and release?

Q. Yes.

A. Numerous.

Q. Do you remember, in any of those times that you've been in jail, what the charges against you were, excluding what we've already talked about?

A. Driving on a revoked license. Basically harassment charge, things that have been brought up that they would arrest me for that made no sense to me.

Q. How many times, of the times that you spent in jail, have you been convicted, do you remember?

A. I believe I've only had three convictions.

Q. And does that include the two convictions [17] for possession of marijuana that we've already talked about?

A. Yes, sir.

Q. What was the other conviction for?

A. The other conviction was for – this is the one that we are talking about now, and why I'm here, correct?

Q. Is it? Is that the other conviction?

A. Yes.

Q. Is the methamphetamine?

A. Yes, sir.

Q. That's my question.

A. Yes, it is.

Q. Do you remember the location, specifically I mean the cities and the states of the places where you've spent time in jail?

A. Yes, sir.

Q. Could you tell me those?

A. Millard County, Draper prison, Beaver County. The time I spent in Beaver County was prison time that they had sent me there to wait my time until I seen the Board of Pardons. Also, I spent a couple of weeks in Gunnison prison doing evaluations. I believe that's all.

Q. Okay. Have you ever been a party to another [18] lawsuit other than this current civil rights lawsuit that were here for?

A. I'm not sure how to answer that. I've had to do depositions because of a lawsuit that was for someone else.

Q. Were you a party to that lawsuit?

A. I don't believe so.

MR. SLAVENS: Counsel, if you'd like I could maybe explain to you off the record.

MR. ANDERSON: That would be fine.

(Whereupon a recess was taken.)

MR. ANDERSON: Back on the record.

Q. For the record, counsel just had a discussion regarding a prior suit or incident in Millard County that involved the residence that was the sister's of Mr. Callahan. Is that an accurate reflection of the conversation?

MR. SLAVENS: Do you want me to summarize it further?

MR. ANDERSON: If you would that would be helpful.

MR. SLAVENS: What happened in that case is I don't recall exactly whose name it was, but Afton did have, or claimed an ownership interest in the house. And part of the plea negotiations was that Afton would give the house back to his father, or give up any rights [19] he had in the house so his father could take it back. They ended up going ahead and Millard County started forfeiture proceedings against Afton's father because of actions of Corina, his sister that lived in the house at the time.

MR. ANDERSON: And this action was resolved with Millard County essentially settling the suit by giving the house back to your family; is that correct?

A. That is correct.

Q. You mentioned that you had your deposition taken with regards to that action; is that correct?

A. Correct.

Q. Do you remember anything about what the parties names in that action were, or how it was captioned for purposes of court proceedings?

A. Are you asking me who was being sued or?

Q. Yes.

A. I believe it was my father and my sister because their names were on the title to the home.

Q. And what's your father's name?

A. Daryl Dean Callahan.

Q. What's your sister's name?

A. Corina Callahan.

Q. And the suit was against Millard County?

A. Yes, sir.

* * *

[34] **Q.** Okay. I want to focus in on the events of March 19th, 2002. Is this the date that is at issue in this lawsuit? Is that the date you remember that the incident occurred at your trailer?

A. Yes, sir.

Q. Do you know who Brian Bartholomew is?

A. Yes, sir.

Q. Did you have a relationship or a friendship with Brian Bartholomew prior to the March 19th, 2002 arrest?

A. Not something you can consider a relationship or a friendship, no.

MR. SLAVENS: I do want to put a general objection on the record that Afton – I don't think Afton's actions are in dispute or at issue in this matter. It's the actions of the state, the police officers. I understand you need foundation.

BY MR. ANDERSON:

Q. Did you have an encounter with Brian Bartholomew at a gas station in Fillmore, Utah on the morning of March 19th, 2002?

A. Yes, I did.

[35] **Q.** And did you have a conversation with him?

A. I remember speaking to him.

Q. Do you remember what you said?

A. I believe I had – just was friendly and said hello, asked him how he was doing.

Q. And do you remember where you were going on the morning of March 19th, 2002?

A. Yes, I do.

Q. Where was that?

A. I was coming here to Salt Lake to see some friends, a person I had worked with.

Q. Did you tell Brian Bartholomew that you were headed to Salt Lake City?

A. Yes, I did.

Q. Did you tell him that the reason you were headed to Salt Lake City was to purchase methamphetamine?

A. No, sir.

Q. And we'll call methamphetamine meth for the rest of the deposition.

So you did travel to Salt Lake City on March 19th 2002?

A. Yes.

Q. And could you explain to me what you did during the day while you were in Salt Lake?

[36] **A.** I visited a friend of mine, and we went over some things that he was doing. He promotes concerts and things like that, and I've worked for him in the past and basically it was a business thing, to see if there was any work here with things for he and I in the future.

Q. Who was this friend that you met with?

A. His name is Kim Smith.

Q. Did you purchase methamphetamine or meth while you were in Salt Lake?

A. No, sir.

Q. Approximately how long were you in Salt Lake on the day of March 19th 2002?

A. Most of the day.

Q. Do you remember when you went back to Millard County?

A. I'm not sure exactly the time, but it was towards the evening. I would have to guess 5 or 6:00.

Q. On the night of March 19th 2002, Brian Bartholomew arrived at your residence, is that correct?

A. That is correct.

Q. And there were some people that were at your residence at that time; is that correct?

A. Yes, sir.

Q. And was one of those people Nick Evans?

[37] **A.** Yes, sir.

Q. Can you explain to me –

A. Mick Evans.

Q. Mick Evans, okay. Can you explain to me your relationship with Mick Evans?

A. I was a friend of his brother, Adam Evans. And so there was times when he would just come over and be there.

Q. And was Adam Evans at the house as well?

A. Yes, sir.

Q. And were your, any of your kids there?

A. Brian Bartholomew came to my house more than once that night. He came with a friend first, who was drinking. At that point in time yes, there was some of my children there in the home.

Approximately when was the first time Mr. Bartholomew arrived at your house?

A. I'm not sure, I believe it was about 8:00.

Q. And do you remember or could you explain to me how that encounter occurred? Did he knock on the door?

MR. SLAVENS: You are referring to the first time?

MR. ANDERSON: Yes.

THE WITNESS: Yes, he did, he had a friend with him. And I don't know who answered the door and let him [38] in. But when he came in he was already intoxicated and he was inquiring about buying some drugs.

Q. And did you sell him drugs that night?

A. No, sir.

Q. When Mr. Bartholomew came to the house was it you that answered the door?

MR. SLAVENS: You are still referring to the first time?

BY MR. ANDERSON:

Q. The first time.

A. Yes, sir. Well, I'm not sure, but I believe it was me.

Q. Now, just so I'm clear, when did Mr. Bartholomew come back the second time?

A. I believe it was about two hours later. He had left and left the person that he brought with him at my home. I didn't even know this person, and this person felt real uncomfortable after about an hour or so. Didn't know where his friend had went, was very intoxicated, said he knew someone else in the trailer park and said he was gonna go over there and wait.

Q. Did he leave?

A. Yes, he did.

Q. Do you remember this person's name?

A. I'm not sure of his first name, but his last [39] name was Nez.

Q. N-e-z?

A. Yes, sir.

Q. So when Mr. Bartholomew showed up the first time, he inquired about purchasing drugs?

A. Yes, sir.

Q. And you stated that you did not sell him drugs the first time; is that correct?

A. That's correct.

Q. When he came back the second time, what happened when he came back the second time?

A. Okay. But the first time that he came, I do believe that he purchased drugs. I did not see the purchase, but I did see him use the drugs. He used methamphetamines and he used them intravenously, he shot them up and then left, and said that it was really good, that he had a friend – no, he said he had a cousin and he'd asked me if I knew him and stated his name and I said no. And he said that he knew that he wanted to get some.

Q. What did he say his cousin's name was?

A. I'm not sure.

Q. And so, your testimony is that then Mr. Bartholomew left your house?

A. That's correct.

[40] **Q.** And then he came back about two hours later?

A. That's correct.

Q. And what happened when he came back two hours later?

A. Well, he must have came back before that, but I didn't see him because he left his truck there at

my trailer and just disappeared. Then there was a point in time when his truck was gone as well.

Q. So at some point he came back and knocked on the door again?

A. No, I believe he just came back and took his vehicle and left.

Q. And at what point during the night were you arrested?

A. I believe it was close to midnight.

Q. And was Mr. Bartholomew at your residence when you were arrested?

A. Yes, sir.

Q. So, let me make sure I've got this straight. He came the first time at around 8 o'clock?

A. I believe so.

Q. And then he left?

A. Yes.

Q. And then he came back and picked up his truck at some point in time about two hours later and [41] then he must have come back again?

A. Yeah, sometime within that two hour period he came and got his truck and it was, I believe, about two hours from the time that he had came at 8:00 which makes it approximately 10, 10:30, somewhere

around there that he came back the second time and knocked on the door.

Q. And what happened the second time when he knocked on the door?

A. He came into the home. There were some things said between me and him about his – about him coming there earlier, and some advances he tried to make with one of my daughters. And my friend Adam kind of got between us, told me we didn't need any problems and I walked away from him.

Q. Did he attempt to purchase drugs the second time that he was at your house?

A. I believe that he did, I didn't actually see.

Q. You believe that he did purchase drugs the second time?

A. Yes.

Q. And then at some point while he was there the second time was when you were arrested?

A. That's correct.

[42] **Q.** You mentioned the second time he knocked on the door there was an encounter between yourself and him where one of your friends tried to get or maybe interfered. Where did that occur in relation to your house?

A. I live in a trailer and when you walk in the front door both the living room area and kitchen are

open, and that's where it occurred. Basically almost at the front door.

Q. And where is the front door of your trailer, is it in the kitchen or –

A. The front door is right in the center of – the kitchen is to one side and the living room is to one side.

Q. Okay. Now, I've got some photos here that I want to show you, and I'll show you them on this color photo, and then we'll introduce as an Exhibit the black and white version. Do you recognize these?

MR. SLAVENS: May I ask, were those pictures provided to us in our response to discovery?

MR. ANDERSON: Off the record for a second.

(Whereupon a discussion was held off the record.)

(Exhibit No. 1 was marked for identification.)

MR. ANDERSON: Back on the record.

Q. Do you recognize the trailer in these photos [43] as your trailer?

A. Yes, sir.

Q. Now, in this one photo there seems to be a wooden enclosure, and a door to the wooden enclosure. Is that wooden enclosure – it seems to be like a porch type area; is that correct?

A. That is correct.

Q. And then the front door that you are referring to, is that the front door that you are referring to inside the wooden enclosure?

A. Yes, sir, it is, that would be the front door.

And for the record the deponent is pointing at the photo with a tab on it marked defendant's Exhibit 20, and referencing a door that is inside the wooden enclosure as being the front door of his trailer.

Now, when you had the –

MR. SLAVENS: I object to that because I think that mischaracterizes his testimony. I think his testimony was that this is the front door, that's the inside door of this wooden one.

MR. ANDERSON: Okay.

THE WITNESS: That's correct.

BY MR. ANDERSON:

Q. You testified that this, this is the door to [44] the porch on this wooden, plywood colored door?

A. The porch is attached to the trailer, is actually part of the trailer. It's the first room that you have to enter before going into the trailer itself.

Q. Okay. Now, when Mr. Bartholomew arrived at the house, which door would he knock on to gain entry to your residence? Would he knock on the porch

door or would he knock on the door to the – to go inside the trailer?

A. Normally everyone would knock on the porch door before entering the home at all. It was the only incident that I remember of him not knocking on that door, that he came right in and then knocked on the door beyond that, which is entering into the living quarters and the kitchen.

Q. Okay. And so the encounter when he came back the second time, did that occur in this porch area, or did it occur inside the trailer?

MR. SLAVENS: For the record I want to object. It's your term porch, that's not a term that Afton has used or adopted.

MR. ANDERSON: Okay.

Q. I'll restate the question. Did the encounter with Mr. Bartholomew occur in this wooden enclosure in the space that's pictured here, or did it [45] occur on the other side of the door inside the trailer?

A. On the other side of the door.

MR. SLAVENS: I think that question is ambiguous, because I don't know what incident you are referring to.

BY MR. ANDERSON:

Q. My question is, you testified earlier that when Mr. Bartholomew arrived at your residence for the second time, he came inside and you and him had

a discussion regarding some things that may have happened before. You mentioned an advance to your daughter that you felt was inappropriate, and I just want to know where that discussion took place. Did it take place inside the trailer, the actual original trailer or did it take place in this addition to the trailer?

A. It took place, I believe, in the kitchen area or in between the kitchen area and the living room area.

Q. And you testified before that the kitchen area is inside what was the original trailer?

A. Yes, sir.

Q. Okay. You mentioned that you believe Mr. Bartholomew purchased drugs at your residence the second time that he arrived there. Did you see that transaction?

A. No.

[46] **Q.** What leads you to believe that he purchased drugs the second time that he arrived there?

A. Because Mr. Evans, Adam, gave me $100 and that's the only way that I could think that he came up with $100 like that.

Q. He gave you the hundred dollars for what purpose?

A. I had loaned him money. He was having a hard time, he was living with his father who was ill and his brother Mick who was also – had some problems.

And I was trying to help him get on his feet and get a place and live.

Q. And do you remember what you heard while you were in your trailer as Mr. Bartholomew approached for the second time?

A. I remember him talking about him and his friend drinking and how drunk he was and how he went and – the second time when he, I believe he was asked where he went by Mr. Evans, he was talking about how drunk he was and basically, yeah. I remember him talking about purchasing cocaine in Cedar City, and just really things that I wasn't paying any attention to.

Q. Approximately how long after Mr. Bartholomew came into your residence this second time was it before the police arrived and arrested you?

[47] **A.** It seemed like a very short period of time. My guess would be within 30 minutes.

Q. And do you remember if you were intoxicated or under the influence of any drugs on the night of March 19th, 2002?

A. I do.

Q. And what would the answer to that be? Were you intoxicated or under the influence of drugs?

A. I was not intoxicated, I was under the influence of methamphetamines.

Q. Approximately how long before Mr. Bartholomew arrived the first time at 8:00, I mean, do you remember when you took the methamphetamines?

A. It was earlier in the afternoon. Probably five or 6:00 when I returned back to the trailer.

Q. So you ingested the meth in Millard County?

A. I'm not sure if it was Millard County or Juab County.

Q. Did you ingest the meth while you were traveling back to Millard County then?

A. I ingested the methamphetamines with another friend of mine that lived in Scipio and we had took a drive.

Q. Do you remember where you got the meth that you ingested that day?

[48] **A.** Yes, I do.

Q. Where was that?

A. From a friend of mine.

Q. Do you know where he got that meth?

A. Where she got the meth?

Q. Where she got the meth?

A. I'm not sure, no.

MR. SLAVENS: Continue my objections to this. I don't think any actions of Afton that day are relevant to the police conduct that occurred there.

BY MR. ANDERSON:

Q. Did you sell any meth on March 19th, 2002?

A. No, sir.

Q. Had you ever sold meth prior to March 19th, 2002?

MR. SLAVENS: Can you, for the record, explain why that's relevant?

MR. ANDERSON: I'm just trying to establish what happened, but you know, I'm not going to explain much further. I just think these questions are relevant, and if you want to object to them, that's fine but, you know, he's going to answer them.

MR. SLAVENS: Well, I'm not sure about that.

BY MR. ANDERSON:

Q. The pending question is had you ever sold [49] meth prior to March 19th, 2002?

MR. SLAVENS: Well, I'm objecting to that, I don't think it's relevant. I will allow Afton to answer with the caveat that I am going to ask the district court judge to strike any answer from the record.

BY MR. ANDERSON:

Q. Go ahead and answer.

A. Yes, I have. Any time that I had sold something like that it was not as a business or a purpose to make money, it was more of a favor or doing something for a friend.

Q. You stated before that Mr. Bartholomew had purchased meth at your residence on March 19th, 2002. Do you know where that meth came from?

A. Yes, I do.

Q. Where was that?

A. From Mr. Evans.

Q. And did Mr. Evans bring that to your residence that night?

A. Yes, he did.

Q. And do you know where –

A. Well, I don't know for sure if he brought that. He came with his brother, and one of them brought that.

Q. And do you know where they stored that meth [50] that night? Did they keep it on their person or place it somewhere in your residence?

A. I didn't find out until after this incident, but they had stored some in the residence as well as on their persons.

MR. SLAVENS: Object because – assuming the source of that knowledge is hearsay, so I object on hearsay.

MR. ANDERSON: Okay.

Q. And where in your residence did you learn they had stored that meth?

A. I can't say that I know for sure that they did, but in the report Brian Bartholomew was the person doing this, stated that he seen somebody retrieve it from the refrigerator.

Q. And let me apologize if I've already asked this. I may have just barely asked it, but did you know where, whichever one of the Evans brought the methamphetamines, had got the methamphetamines?

A. No, sir.

Q. Okay. When the police arrived at your residence, do you remember where you were when the police arrived?

A. Yes.

Q. And could you tell me where you were?

[51] **A.** I had just stepped through the doorway that you see in the picture in front of the living room/kitchen area to the other room that you called the wooden enclosure.

Q. Okay. And do you remember what was going on in that room as the police were coming in or as they were approaching it?

A. I never seen them approach it. I stepped out behind Brian Bartholomew and Adam Evans and right as I was stepping out into the other room – but I just remember the door flying open. It was dark, they had flashlights and they were yelling and screaming Get on the ground, it was the police. I remember at one point Adam thinking this was a joke and was reaching for one of their flashlights which he realized was taped on their gun, and was thrown to the floor immediately.

Q. Did they do a protective sweep of your residence?

MR. SLAVENS: That's kind of a term of art that I'm not sure he's familiar with.

THE WITNESS: I don't know what they did because I was thrown on the floor immediately, face down, and there was an officer or deputy, somebody was standing on my back. I wish I could see what was going on around me.

[52] BY MR. ANDERSON:

Q. Let me rephrase. Did they search your residence?

A. Oh, yes.

Q. Did you ever okay them to search your residence?

A. No, sir.

Q. When the police entered, or came through the door of this exterior room, did you have a baggie in your hand?

A. No, sir.

Q. Approximately how long would you say the police were there from the time they first entered until the time they arrested you and left?

A. They placed me under arrest immediately.

Q. Okay. And then how long were they there?

A. I laid – they had me there on the floor, I was there approximately 10 or 15 minutes face down with an officer standing on me. Then they picked me up, took me into the kitchen area, stood me up. At that point when they stood all three of us up is the point where they found methamphetamines. They found the methamphetamines under Mick Adams. I remember the captain of the task force immediately seen that and saying them drugs, make sure that them drugs go with [53] him. As they picked him up they picked up the drugs as well. They took us into the house, back into the kitchen area. At this time they had Brian and taken him outside.

They were searching the home at that point. Then I remember a deputy coming in and speaking with the captain of the task force and telling him that their informant said that I was the one that had the drugs, and had been the one that supplied the drugs.

At that point the captain got in my face and started becoming violent, saying he knew it was me. I don't know what the period of time that they had us there after that. But then we were searched after we were stood up and brought into the kitchen area. The house was searched and we were taken to jail. I believe it was probably at least an hour or so.

Q. Do you remember this plywood colored door jiggling or rattling immediately prior to the police entering, entering this outer enclosure on the night in question?

A. It would appear – what I remember was Mr. Bartholomew tried to find a way out at the same time that the door came open, but the door did not have like a regular door knob, it had a latch that was on the inside. So if you didn't know how to open it, it could [54] be very difficult to figure out how to get out.

Q. And so –

A. I'm not sure, but it seems like he was trying to figure out how to open the door at the same time that the police came in the door, almost together.

Q. And how did the cops get in the door without there being a regular handle?

MR. SLAVENS: I object to the extent it asks him to speculate.

BY MR. ANDERSON:

Q. Do you remember the cops kicking the door in?

A. They didn't kick the door in, no, they opened the door theirselves.

Q. Okay. Is there a doorbell on this that leads through this plywood colored door?

A. No.

Q. Is there a lock to lock this door other than the latch that you've described?

A. Yes, there's a lock, you can unlock it from the inside or the outside.

Q. Was this, this plywood enclosure of the – I mean, what did you call this room that was enclosed with the plywood enclosure? It looks like there's some bikes stored in there, some drums?

[55] **A.** It was used for several purposes, yes. There was drums, musical equipment. It was basically lived in, there was a hammock, it was basically like a bedroom.

Q. Okay.

MR. SLAVENS: Counsel, if you establish this – I guess my objection is that you're assuming facts that are not in evidence, and maybe I missed it, but I don't recall there being any testimony that these pictures reflect the inside of this wooden enclosure.

MR. ANDERSON: Okay.

Q. Let's get that on the record then. Are these pictures that are marked Defendant's Exhibit 21, Defendant's Exhibit 20, Defendant's Exhibit 22 and Defendant's Exhibit 23, are they pictures of the inside of this wooden enclosure that's pictured in Defendant's Exhibit 19?

A. That's correct.

MR. SLAVENS: Did we call that whole exhibit, Exhibit number 1 of the deposition?

MR. ANDERSON: Yes.

MR. SLAVENS: Okay.

BY MR. ANDERSON:

Q. When was this room constructed, or added onto the trailer?

[56] **A.** I'm not sure, it was part of the purchase when I got it.

Q. And if you were to enter through this plywood colored door and come into this room that's pictured in Exhibit 1 to the deposition, and arrive at the door that would enter into the kitchen of your trailer, describe for me how this door looks. Is there a doorbell there? Is there a lock? It looks like there's a door knob; is that correct?

A. Yes, that's correct, it looked like an ordinary door.

Q. Was there a doorbell there that had been left there from when this was constructed?

A. No.

Q. How did this door, the door that went into the kitchen area, how did it lock?

MR. SLAVENS: That's assuming it did lock.

BY MR. ANDERSON:

Q. Did it lock?

A. Yes, it did, it locked like an ordinary door, it could be locked from the inside or from the outside with a key.

I just have a few more questions. I just want to clarify the events that occurred as you left Salt Lake on March 19th, 2002. Did you travel back to [57] Millard County directly?

A. No.

Q. Explain for me, if you would, where did you go when you left Salt Lake?

MR. SLAVENS: May I voir dire the question just so I make sure he's understanding the question?

MR. ANDERSON: Sure.

MR. SLAVENS: Do you have some question whether or not Scipio is in Millard County or not?

THE WITNESS: No, I know it is.

MR. SLAVENS: All right.

THE WITNESS: As far as your question, did I go anywhere else before I entered Millard County –

BY MR. ANDERSON:

Q. When you left Salt Lake, did you travel straight back to Fillmore?

A. No.

Q. Which city did you travel to from Salt Lake?

A. I went to a town called Scipio.

Q. When you arrived in Scipio, is this when you ingested the meth that you talked about before?

A. I went with a friend of mine for a ride and that's when we ingested the meth. I believe it was probably Juab County.

Q. And then after you ingested it, what time [58] was it? I probably asked this, but what time was it when you took the meth approximately?

A. I would say four or five o'clock.

Q. Okay. And then did you travel from Scipio to Fillmore?

A. Yes, sir.

Q. Okay. I think that's all the questions I have.

MR. SLAVENS: Okay. I don't have any questions.

MR. ANDERSON: Did we decide what to do about the original?

MR. SLAVENS: I don't think he needs to read it, it's short.

(Whereupon the deposition was concluded.)

STATE OF UTAH)
)
COUNTY OF SALT LAKE)

I, LINDA J. SMURTHWAITE, a Certified Shorthand Reporter, Registered Professional Reporter, and Notary Public for the State of Utah, residing in Utah, certify:

That the deposition of AFTON DALE CALLAHAN was taken before me pursuant to NOTICE at the time and place therein set forth, at which time the witness was by me duly sworn to testify the truth.

That the testimony of the witness and all objections made and all proceedings had at the time of the examination were recorded stenographically by me and were thereafter transcribed. And I hereby certify that the foregoing deposition transcript is a full, true, and correct record of my stenographic notes so taken.

I further certify that I am neither counsel for or related to any party to said action nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my hand and affixed my official seal this 6th day of January, 2006.

/s/ Linda J. Smurthwaite
LINDA J. SMURTHWAITE
Certified Shorthand Reporter
Registered Professional
Reporter and Notary Public
in and for the County of Salt
Lake, State of Utah

My Commission Expires:
March, 2008

[SEAL]
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[SEAL]

BEFORE THE BOARD OF PARDONS AND PAROLE OF THE STATE OF UTAH

PAROLE AGREEMENT

[Names Omitted In Printing]

Name CALLAHAN, AFTON DALE	Offender # 68413	USP # 28258

I, CALLAHAN, AFTON DALE, agree to be directed and supervised by Agents of the Utah State Department of Corrections and will abide by the following conditions of my parole, effective May, 06, 2000:

1. RELEASE: On the day of my release from the institution of confinement, I will report to my assigned AP&P Officer unless otherwise approved in writing from Adult Probation and Parole.

2. CURFEW: I will comply with a 9:00 pm to 6:00 am curfew for the first thirty (30) days of my parole. Exceptions to this curfew may be granted for work, school, therapy, or other circumstances, but must be approved in advance by officers from AP&P.

3. ABSCONDING: I will not abscond from parole supervision. A-Reporting: I will report as directed by the Utah Department of Corrections. B-Residence: I will

establish and reside at a residence of record and will not change my residence without first obtaining permission from my AP&P Officer. C-Leaving the State: I will not leave the state of Utah, even briefly or any other state to which I am released or transferred without prior written permissions from my AP&P Officer.

4. CONDUCT: I will obey all state, federal and municipal laws. I will submit DNA identifier as required by law. If arrested, cited or questioned by a peace officer, I will notify my AP&P Officer within 48 hours of the incident.

5. HOME VISITS: I will permit visits to my place of residence by officers of Adult Probation and Parole for the purpose of ensuring compliance with the conditions of my parole. I will not interfere with this requirement; i.e. having vicious dogs, perimeter security doors, refusing to open the door, etc.

6. SEARCHES: I will permit officers of Adult Probation and Parole to search my person, residence, vehicle

or any other property under my control without a warrant at any time, day or night, upon reasonable suspicion to ensure compliance with conditions of my parole.

7. WEAPONS: I will not own, possess, have under my control or in my custody any explosives, firearms or dangerous weapons as defined in Utah Code Annotated, Section 76-10-501, as amended.

8. EMPLOYMENT: Unless otherwise authorized by my parole agent, I will seek, obtain and maintain verifiable, lawful, full-time employment (32 hours per week minimum) as approved by my AP&P Officer. I will notify my AP&P Officer of any change in employment within 48 hours.

9. ASSOCIATION: I will not knowingly associate with any person who is involved in criminal activity or who has been convicted of a felony without approval from my AP&P Officer.

10. CHEMICAL ANALYSIS: I will submit to test of my breath, body fluids or hair to ensure compliance with the Parole Agreement.

11.	TRUTHFULNESS:	I will be cooperative, compliant and truthful in all my dealings with Adult Probation and Parole.
12.	FEES:	I will pay supervision fees as determined by the Department of Corrections.
13.	SPECIAL CONDITIONS:	
	1. OTHER	Submit to a Substance Abuse evaluation and complete treatment as recommended.
	2. PAROLE-NO ALCOHOL	Not consume or possess any alcohol.

I have read, understand and agree to be bound by this agreement. If I violate any of the conditions of this agreement, the Board of Pardons may revoke my parole or the Department of Corrections may take other appropriate action against me.

_____ SIGNED: ____ Offender #: ____
DATE

_____ WITNESSED BY: _____
DATE

AUTHORIZED BY: /s/ M. R. Sibbett
Chairman: Board of Pardons and Parole

Supreme Court of the United States
Monday, March 24, 2008

CERTIORARI GRANTED

07-751 PEARSON, CORDELL, ET AL. V. CALLAHAN, AFTON

The petition for a writ of certiorari is granted. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: "Whether the Court's decision in *Saucier v. Katz*, 533 U. S. 194 (2001) should be overruled?"

PETITIONER'S BRIEF

Batch 816
94

(5)

No. 07-751

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

CORDELL PEARSON; MARTY GLEAVE;
DWIGHT JENKINS; CLARK THOMAS;
and JEFFREY WHATCOTT,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment is violated when police officers enter a home after a confidential informant has been admitted inside to purchase drugs, the informant completes the purchase, and he then signals the purchase to the officers waiting outside.

2. Whether the officers are entitled to qualified immunity.

3. A question added by the Court: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007). It appears in the Petition Appendix beginning at Pet. App. 1. The opinion of the United States District Court for the District of Utah is *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006). It appears in the Petition Appendix beginning at Pet. App. 30.

JURISDICTION

This Court has jurisdiction according to 28 U.S.C. § 1254(1). The Tenth Circuit entered judgment on July 16, 2007. Pet. App. 1. The petitioners filed a timely petition for rehearing en banc that was denied by an order of the Tenth Circuit on September 6, 2007. Pet. App. 6. The petitioners filed a petition for a writ of certiorari on December 4, 2007, and the Court granted the petition on March 24, 2008. *Pearson v. Callahan*, 128 S.Ct. 1702 (2008).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent seeks damages under 42 U.S.C. § 1983 for an alleged violation of his Fourth Amendment rights. The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

This case involves an undercover drug buy monitored by the petitioners, five police officers, that occurred at the home of the respondent, Afton Callahan. The officers are all members of the Central Utah Narcotics Task Force, a multijurisdictional group formed to pool law enforcement resources in areas of central Utah. The Commander of the Task Force is Cordell Pearson, who at the time of the arrest in this case had seventeen years of experience as a narcotics

officer in Las Vegas and seven years as the elected Sheriff of Piute County before accepting the position as Task Force Commander. The other members of the Task Force are Detective Jeffrey Whatcott, who had about twenty years of experience at the Millard County Sheriff's Office; Sherriff Marty Gleave, the elected Sheriff of Piute County; and Task Force Detectives Clark Thomas and Dwight Jenkins.

In the late 1990s, the state of Utah suffered a dramatic rise in the illegal use of methamphetamine, a Schedule II narcotic under the Controlled Substances Act of 1970.[1] The Task Force focused its efforts on interrupting the methamphetamine market in central Utah using confidential informants. J.A. 248-49. Confidential informants typically are individuals who have been arrested for drug crimes and volunteer to help the police in exchange for leniency at sentencing. J.A. 47-48. Investigators rely on confidential informants to identify those involved in the drug trade and to arrange undercover purchases that the police can monitor. The Task Force relied particularly heavily on confidential informants in part because individual members of the Task Force were known to those in the local drug trade. J.A. 47.

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[1] *See* Paul Pringle, *An Unlikely Battlefield in the Drug War: Salt Lake City Confronts Meth Labs, Trafficking Rise*, DALLAS MORNING NEWS, July 9, 2000, at Page A1.

This case involves a particular confidential informant, 24-year-old Brian Bartholomew. In January 2002, Bartholomew was arrested on methamphetamine possession charges in his hometown of Fillmore, Utah. Fillmore is a small town located about a two-hour drive from Salt Lake City; according to the 2000 Census, the population of Fillmore was 2,253. After his arrest, Bartholomew asked detectives if he could become a confidential informant to try to work off the criminal charges against him. J.A. 48, 112. The detectives put Bartholomew in contact with the Task Force, and specifically with petitioner Detective Whatcott. The Task Force accepted Bartholomew as an informant on the condition that he would cease all narcotics use and that he would report to Whatcott if he gained any information about pending drug crimes. J.A. 49, 80.

Bartholomew signed papers formally registering as a confidential informant for the Task Force. At that time, officers asked Bartholomew to name individuals that he might help the Task Force target in future cases. Bartholomew named the respondent, Afton Callahan, as a possible target. J.A. 114-15, 165-66. Callahan lived just down the road from Bartholomew, and he was on parole following his imprisonment on drug charges from 1998 to 2000. J.A. 117, 285, 391-94. The record suggests that Bartholomew and Callahan were longtime acquaintances but did not know each other well. J.A. 110-11, 364-65.

The events leading to this litigation happened a few weeks after Bartholomew signed up as a

confidential informant. On March 19, 2002, at about 10am, Bartholomew took a break from work to buy a Pepsi at a nearby gas station. Callahan happened to be at the gas station at that time, and the two saw each other and started up a conversation. Callahan told Bartholomew that he would be traveling to Salt Lake City that day and that he would have methamphetamine when he returned. J.A. 114, 365-67.[2] Bartholomew inquired about buying some of Callahan's methamphetamine, and Callahan responded that Bartholomew could "stop by" his home that night when he was back from Salt Lake City. J.A. 140.

Bartholomew left the gas station and immediately contacted Detective Whatcott. Bartholomew told Whatcott of his arrangement with Callahan, and Whatcott instructed Bartholomew to wait until Callahan returned in the evening and to first confirm

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[2] For the purposes of summary judgment, the record in this case includes a trial transcript from the state trial in 2002 as well as a 2006 deposition of Afton Callahan. Contested facts must be construed in favor of Callahan, the nonmoving party. *See Hope v. Pelzer*, 536 U.S. 730, 733 n.1 (2002). In the 2002 criminal trial, Bartholomew testified that Callahan had stated that he was "going north and he may be bringing some drugs back," and that "he would be back later" and that Bartholomew could "stop by." He also agreed with counsel's statement that he had "asked [Callahan] if [he] could get some drugs, and [Callahan] really put [Bartholomew] off." J.A. 140. In the 2006 deposition Callahan denied that he had told Bartholomew that the reason he was going to Salt Lake City was to purchase drugs, and he also denied himself purchasing drugs in Salt Lake City on that day. *See* J.A. 366.

that Callahan had returned from Salt Lake City with the methamphetamine. Bartholomew returned to work. After work ended at about 5pm, Bartholomew and a friend met for a few hours and split a 12-pack of Bud Light. J.A. 81, 115, 143-44. At about 8pm, Bartholomew went to Callahan's home to confirm that Callahan had methamphetamine to sell.[3] Callahan lived in a single-wide trailer located in the Chalk Creek Trailer Park in Fillmore, just down the street from Bartholomew's house. J.A. 313 (photographs of the Callahan residence). Callahan was inside the trailer along with his daughter and two social guests, brothers Adam and Mick Evans. J.A. 367-68.

Bartholomew entered the trailer and asked Callahan if he could purchase methamphetamine. Callahan was already under the influence of methamphetamine himself, as he had ingested some about two hours earlier. J.A. 74, 91, 377-78. Callahan reached into his freezer and pulled out 5 or 6 baggies of meth. J.A. 117. Bartholomew asked Callahan how much he would sell, and Callahan responded that he would sell Bartholomew as much as Bartholomew wanted.[4] Bartholomew replied that he didn't have

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[3] Bartholomew's friend, Jared Nez, also accompanied Bartholomew to Callahan's trailer. Nez did not know that Bartholomew was working with the Task Force, and he was dropped off after the first visit to the trailer that night. J.A. 117-19.

[4] In the 2006 deposition Callahan denied personally selling drugs to Bartholomew that night, J.A. 368, although he testified that he believed that Bartholomew had purchased drugs from the Evans brothers in the first visit to Callahan's home, J.A.

(Continued on following page)

enough cash with him, but that he would go get money and return later in the evening to make a purchase. J.A. 117. Unbeknownst to the members of the Task Force, and in violation of his agreement with them, Bartholomew also ingested a "taste" of the meth before departing Callahan's trailer. J.A. 145. Bartholomew departed Callahan's trailer at about 9pm.

Bartholomew called Detective Whatcott again and confirmed to him that Callahan had methamphetamine to sell. Whatcott contacted the other members of the Task Force and asked them to meet with Bartholomew immediately in the public safety building in the Millard County Sherriff's Office. From about 9pm to 11pm, members of the Task Force met with Bartholomew and arranged to monitor an undercover buy. Bartholomew was given a "wire," an electronic microphone, so the members of the Task Force could overhear what Bartholomew was saying. Bartholomew was also given a marked $100 bill that he could use to buy meth from Callahan, and he was searched to ensure that he was not in possession of

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370. Callahan also agreed that "Bartholomew showed up the first time [and] inquired about purchasing drugs" and that Bartholomew also said that his cousin wanted to get some drugs. J.A. 370. Although contested facts must be construed in Callahan's favor at summary judgment, these facts are not in conflict with Bartholomew's testimony about his first visit to Callahan's home that night. Further, as explained in footnote 6, infra, the principle of judicial estoppel prohibits Callahan from denying that he distributed methamphetamine.

illegal substances. Finally, members of the Task Force provided Bartholomew with coffee and asked Bartholomew if he was in the physical condition needed to perform as required. Bartholomew indicated that he was.

The officers devised the following plan. First, Bartholomew would go back to Callahan's home and be admitted inside under the guise of returning to purchase the drugs. Second, after the purchase was complete and Bartholomew was ready to leave, he would signal that he had purchased the drugs from Callahan by talking about "playing the drums," a reference to the drum kit located in the enclosed 8'x10' wooden porch area at the entrance to Callahan's trailer. J.A. 55, 61, 65, 120, 126, 302. Third, Detective Whatcott would monitor the wire from his squad car nearby: he would give the "go" sign to Jenkins and Thomas when he heard Bartholomew give the signal. At that point the officers would enter the trailer and catch Callahan and others involved in the act. The officers would pretend that they did not know Bartholomew and would treat him like a suspect in order to hide his cooperation with the police. J.A. 68-69.

At about 11pm, the five members of the Task Force went with Bartholomew to Callahan's home. Detectives Jenkins and Thomas dropped off Bartholomew about 150 yards from the trailer so the officers would not be spotted. They watched as Bartholomew walked over to the trailer. Bartholomew knocked on the door, and Callahan's daughter let him

in before herself leaving the trailer. J.A. 123. Jenkins and Thomas moved their squad car to within about 15 to 20 yards of the trailer and waited for Detective Whatcott to give the "go" sign. J.A. 185-88. After entering the trailer, Bartholomew found Callahan together with the two Evans brothers in the living room area of the trailer. Bartholomew told the group that he was there to "party it up." He also told them about his recent drug arrest. J.A. 124.

After talking with the group for a few minutes, Bartholomew asked Callahan if he could buy some meth. Bartholomew purchased the meth with the $100 bill, and he then began to walk to the door on his way out to leave the trailer. At that point, Bartholomew gave the prearranged signal: he told Callahan that the wanted to "play the drums" that were in the enclosed porch area. Callahan responded that it was too late, as playing the drums would wake up the neighbors. J.A. 126. Detective Whatcott was listening on the wire and he heard Bartholomew give the signal. Whatcott gave Jenkins and Thomas the "go" sign to enter the trailer.

Thomas and Jenkins entered first from the wooden porch area attached to the front of the trailer, and the other officers followed after them. Upon entering, the officers ordered the individuals inside the trailer on to the ground. At about that time, a Task Force member observed Callahan drop a plastic bag later found to contain methamphetamine. J.A. 266. When Callahan, the Evans brothers, and Bartholomew were secure on the ground, the officers

conducted a protective sweep to determine if any others were present and might pose a threat. A search of the individuals revealed the methamphetamine Bartholomew had purchased in his possession as well as the $100 marked bill in Callahan's possession. Officers also found syringes inside the trailer, as well as additional meth inside Adam Evans' belt buckle.

Callahan and Adam Evans were each charged with methamphetamine-related crimes. Evans pled guilty to simple possession of methamphetamine, and Callahan went to trial on methamphetamine distribution charges on August 5, 2002. J.A. 22-312 (trial transcript). Bartholomew and the officers testified against Callahan. During the trial, Callahan moved to suppress the evidence seized in his home on two grounds. First, he argued that Bartholomew was too intoxicated to serve as a reliable informant. Second, he argued that the officers' entry into his home was unconstitutional because the officers lacked probable cause. The trial judge denied the motions, holding that the first issue went to the weight of the evidence and that exigent circumstances justified the officers' entry. J.A. 5-21, 295-302, 324-29.

Following the close of the evidence, Callahan pled guilty to felony distribution of methamphetamine. J.A. 303-12. The trial court sentenced Callahan to serve a minimum of five years in prison. J.A. 314-23. The plea agreement permitted Callahan to appeal the trial court's Fourth Amendment ruling, however, and on appeal Callahan renewed his claim that the entry violated the Fourth Amendment. In its brief to

the Utah Court of Appeals, the government abandoned its earlier exigent circumstances defense of the officers' entry and instead argued that the evidence should be admissible under the inevitable discovery exception. The Utah Court of Appeals ruled that the inevitable discovery doctrine did not apply and remanded with instructions to grant Callahan's motion to suppress. *State v. Callahan*, 93 P.3d 103, 107 (Utah Ct. App. 2004).

Callahan then filed a civil suit in the United States District Court for the District of Utah against the Task Force, the several Counties that participated in it, and the individual officers. Callahan alleged a violation of his Fourth Amendment rights, actionable under 42 U.S.C. § 1983, together with various state law claims. District Judge Paul Cassell granted the defendants' motion for summary judgment on the federal claim and then declined to exercise supplemental jurisdiction over the state claims. *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006), Pet. App. 30.

According to Judge Cassell, the strongest claim that the officers' entry was constitutional came from the circuit court opinions recognizing the doctrine of "consent once removed." Pet. App. 47. This doctrine permits police officers to enter a home without a warrant if an "undercover agent or informant . . . 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from

other officers." *United States v. Pollard*, 215 F.3d 643, 648 (6th Cir. 2000). Judge Cassell noted that three circuits had already embraced the "consent once removed" doctrine: the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit. Pet. App. 48. Two of those circuits (the Sixth and the Seventh) had specifically agreed that the doctrine applied when the initial entry was made by a confidential informant instead of an undercover police officer. Pet. App. 48-50. No courts had rejected the doctrine.

Judge Cassell reasoned that in light of the circuit court precedents accepting the doctrine of "consent once removed," the "simplest approach" to resolve Callahan's civil lawsuit was to assume that the entry was unconstitutional and instead decide the case on qualified immunity grounds. Pet. App. 53. The entry into Callahan's trailer involved facts "essentially identical" to the facts of cases from the Seventh Circuit and the Sixth Circuit applying the "consent once removed" doctrine. Pet. App. 51. Regardless of whether the entry was constitutional, the officers were entitled to qualified immunity because the caselaw on the "consent once removed" doctrine effectively prevented the officers' conduct from violating clearly established law:

> [I]n [the] Sixth, Seventh and Ninth Circuits their actions would have been fully consistent with the Constitution. Put another way, unless and until the Tenth Circuit or the Supreme Court rejects the "consent-once-removed" doctrine, a police officer in Utah

> relying on the doctrine (in a case where the doctrine factually applies) has not violated a clearly established right.

Pet. App. 55-56. Judge Cassell also granted summary judgment to the counties and the Task Force under the principles of *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978). Pet. App. 57-58.[5]

A divided Tenth Circuit reversed in an opinion by Judge Murguia, sitting by designation. *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007), Pet. App. 1. According to the majority, the officers' entry into Callahan's trailer violated the Fourth Amendment because it went beyond the scope of consent that Callahan had granted when he had admitted Bartholomew inside. "Had the person inside Mr. Callahan's home been an undercover officer," the majority reasoned, the officers' entry would have been constitutional: "Mr. Callahan would have consented to opening his home to the police," and his consent to the entry of an undercover officer would have included consent to the entry of the Task Force officers waiting outside. *Id.* at 896. However, Callahan had not consented to the entry of police because Bartholomew was a confidential informant rather than an undercover police officer. Further, the "distinct obligations and powers" of police officers and informants

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[5] The liability of the counties and the Task Force as an entity are not before the Court. The only remaining claims are against the Petitioners as individual officers.

required "a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house." *Id.* at 897. Because Callahan had invited an informant inside his home rather than an undercover police officer, the officers' subsequent entry violated the Fourth Amendment. *Id.* at 898.

The majority next ruled that the officers were not entitled to qualified immunity because they had violated Callahan's clearly established constitutional right. Specifically, the officers had violated the clearly established right "to be free in one's home from unreasonable searches and arrests." *Callahan*, 494 F.3d at 898. According to the majority, "the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Id.* at 899. Because the officers' entry did not fit either exception, it was clearly established that the entry violated the Fourth Amendment. The Seventh Circuit's decision holding that such warrantless entries complied with the Constitution was irrelevant: "The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear. . . . The precedent of one circuit cannot rebut that the clearly established weight of authority is as the Tenth Circuit and the Supreme Court have addressed it." *Id.*

Judge Paul Kelly dissented on both the Fourth Amendment question and qualified immunity. *See Callahan*, 494 F.3d at 899-903 (Kelly, J., dissenting).

On the Fourth Amendment issue, Judge Kelly began by agreeing with the panel majority that the officers could have entered if the undercover individual had been a law enforcement officer. However, Judge Kelly disagreed with the majority's conclusion that Bartholomew's status as a confidential informant made a difference:

> So long as an invitation to enter is extended to a government agent (even unknowingly), the pertinent issue is not the type of government agent allowed in, but the consequence of that invitation, combined with the subsequent sale of narcotics, on a resident's reasonable expectation of privacy. And the only principled resolution of that issue is to hold that, no matter what type of government agent is allowed in, any previously existent legitimate expectation of privacy is abandoned.

Id. at 902 (Kelly, J., dissenting). Judge Kelly was similarly unpersuaded by the majority's reliance on the different "powers and obligations" of undercover officers and informants. Such differences were more elusive and difficult to apply than the majority suggested. *Id.*

Next, Judge Kelly concluded that there was "no doubt" that the officers were entitled to qualified immunity because "the right at issue was not clearly established at the time the Task Force acted." *Id.* at 903 (Kelly, J., dissenting). The majority had misconstrued the relevant right, Judge Kelly argued:

properly understood, the relevant right was "the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause." *Id.* Because "no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right," the majority should have looked at the law of other circuits. *Id.* And looking to the other circuits revealed that the officers reasonably believed their conduct was constitutional: "the clear weight of authority from other circuits strongly suggested that the Task Force's actions in this case were legal[.]" *Id.* at 904 (Kelly, J., dissenting).

The Tenth Circuit denied the officers' petition for rehearing, Pet. App. 60, and the Court granted certiorari on whether the entry violated the Fourth Amendment and whether the officers were entitled to qualified immunity. *Pearson v. Callahan*, 128 S.Ct. 1702 (2008). The Court's order granting the petition also directed the parties to brief and argue the following question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?" *Id.*

SUMMARY OF ARGUMENT

The entry of additional officers into Callahan's trailer did not violate the Fourth Amendment because Callahan had already admitted a government agent

into his home to sell him illegal drugs. By inviting Bartholomew into his home so Bartholomew could purchase methamphetamine, Callahan surrendered his expectation of privacy in what he intentionally revealed. A person who admits an informant into his home and displays evidence of his crime assumes the risk that the informant will share what he has learned with the police. In that setting, the officers did not infringe any additional expectation of privacy when they entered to see what Bartholomew had seen. The officers' entry did not reveal any new information. What was private before remained private. What was exposed before remained exposed. No additional expectation of privacy was infringed, and therefore no Fourth Amendment search occurred and no warrant was required.

Even if the officers' entry was a Fourth Amendment search, the entry was constitutionally reasonable because it was incident to Callahan's arrest. The officers and Bartholomew devised a plan to arrest Callahan at the appropriate time; Bartholomew triggered the process when he gave the prearranged signal, and the officers entered incident to the arrest to carry it out. The officers' entry was a reasonable way to protect Bartholomew's safety and to protect the integrity of the arrests that occurred inside. Although Bartholomew had the constitutional and statutory authority to arrest Callahan himself, the compelling interest of safety and the need to deter the escape of the subjects required several officers to enter to make the arrests. No one person could have

carried out the multiple arrests safely and effectively. The officers' assistance was necessary to complete the arrests that Bartholomew had triggered and therefore fits within the well-established incident-to-arrest exception to the warrant requirement.

If the Court concludes that the officers' entry violated the Fourth Amendment, the Court should nonetheless hold that the officers are entitled to qualified immunity because the entry did not violate clearly established law. When the entry occurred in 2002, several circuit courts and state supreme courts had already embraced a "consent once removed" doctrine that explicitly allowed the officers' entry without a warrant. No court had rejected the "consent once removed" cases, and those cases had become part of the background of Fourth Amendment rules viewed as settled law in treatises and among law enforcement.

The officers were entitled to rely on that caselaw even though their own federal circuit had not yet ruled on "consent once removed" entries. The principles of qualified immunity shield officers from personal liability when an officer reasonably believes that his conduct complied with the law. Police officers are not legal scholars, and they are entitled to rely on existing lower court cases without facing personal liability for their assessments of what the Fourth Amendment permits. The weight of caselaw on "consent once removed" entries at the very least created a legitimate question as to whether the officers' entry

was constitutional. It therefore triggered qualified immunity.

Finally, the Court should limit or overrule *Saucier v. Katz*, 533 U.S. 194 (2001), in the Fourth Amendment setting. The goal of ordering decision-making in qualified immunity cases should be to best accommodate two important but sometimes competing interests: first, fostering the clarity of the law; and second, avoiding unnecessary constitutional rulings that can burden the courts and create precedents of uneven quality. The existing *Saucier* rule does not satisfy this goal, as the one-size-fits-all rule does not recognize the diverse types of constitutional tort cases. Two alternative rules would be preferable to the existing *Saucier* rule. First, the Court could rule that *Saucier* need not be followed in Fourth Amendment claims. Second, the Court could hold that the existing *Saucier* rule should be limited to Fourth Amendment claims that do not involve fruits of the poisonous tree and therefore will not be addressed under the exclusionary rule.

ARGUMENT

I. THE OFFICERS DID NOT VIOLATE THE FOURTH AMENDMENT.

A. The entry of additional agents into Callahan's home did not infringe any additional expectation of privacy because Callahan had already admitted a government agent into his home to sell him illegal drugs.

This case involves the relationship between two basic principles of the Fourth Amendment's prohibition on unreasonable searches and seizures. The first principle is the Fourth Amendment's protection of the home; the second principle is the waiver of rights when a person knowingly exposes evidence of crime to a government agent. On one hand, protecting the privacy of the home is one of the central purposes of the Fourth Amendment. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Fourth Amendment protections reach their peak inside the home. "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Payton v. New York*, 445 U.S. 573, 589 (1980).

On the other hand, this Court has frequently recognized that a suspect waives his Fourth Amendment protection when he knowingly shares evidence of crime with an undercover agent or confidential informant. A person engaged in criminal activity must assume the risk that his confidant is an informant; the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966). *See also United States v. Miller*, 425 U.S. 435, 443 (1976). As Justice Powell explained in *United States v. White*, 401 U.S. 745, 752 (1971), "one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end, or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his."

Under these principles, Callahan enjoyed full Fourth Amendment protection in his home before he invited Bartholomew inside to purchase methamphetamine. It is irrelevant that Callahan's home was a modest trailer with a rickety wooden porch. Under our Constitution, "the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States v. Ross*, 456 U.S. 798, 822 (1982). If Callahan had not encountered Bartholomew at the gas station that morning – or if Callahan had said "no" when Bartholomew asked if he could come to Callahan's home

to buy methamphetamine – Callahan would have retained all of his Fourth Amendment rights in his home. In those circumstances, the Fourth Amendment would have prohibited the officers' entry without a warrant or exigent circumstances. *See Payton, supra.*

The critical fact that makes this case different is that Callahan did in fact invite Bartholomew to enter his home to purchase illegal drugs inside. By permitting Bartholomew inside the home to engage in an illegal narcotics purchase, Callahan surrendered his usual Fourth Amendment protection in the area of his home that he displayed to Bartholomew. Callahan assumed the risk that Bartholomew was an agent of the government who would in turn expose what he observed to the police. In these circumstances, the fact that additional officers entered into the home to see what Bartholomew had already seen did not violate any legitimate privacy right.

The Court established this principle most clearly in *Lewis v. United States*, 385 U.S. 206 (1966). In *Lewis*, an undercover federal agent telephoned Lewis at home and explained that he wished to purchase marijuana. Lewis replied that he could "take care" of the caller and invited the caller to his home to sell him the narcotics. The agent entered the home, purchased marijuana for $50, and then left. After Lewis was arrested for the sale, he argued unsuccessfully that the undercover agent's warrantless entry into the home had violated the Fourth Amendment. This Court disagreed on the ground that admitting

the undercover agent into his home to purchase narcotics waived the defendant's Fourth Amendment rights in the area he exposed:

> Without question, the home is accorded the full range of Fourth Amendment protections. But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.

Id. at 211 (internal citations omitted).

By "opening his home" to the sale of narcotics, Lewis had "[broken] the seal of sanctity and waive[d] his right to privacy in the premises." *Id.* at 213 (Brennan, J., concurring). Of course, the waiver was limited to the area that Lewis had actually exposed to the undercover agent; the fact that an agent had been admitted to one area of the home did not waive privacy rights in areas of the home that remained hidden. *See id.* at 213 (Brennan, J., concurring). *See also Gouled v. United States*, 255 U.S. 298, 306 (1921) (holding that when an undercover government agent is admitted by stealth, "any search and seizure subsequently and secretly made in [the target's] absence, falls within the scope of the prohibition of the Fourth Amendment"). But Lewis's Fourth Amendment rights in the area exposed to the undercover agent were waived during the period the agent was inside the home. *Lewis*, 385 U.S. at 213 (Brennan, J., concurring).

The principle of *Lewis* governs here. Callahan turned his home into a commercial center when he invited Bartholomew to enter for the purpose of transacting unlawful business inside. At that point, Callahan's trailer was "entitled to no greater sanctity than . . . a store, a garage, a car, or . . . the street." *Lewis*, 385 U.S. at 211. *See also United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986) (Posner, J.) ("[T]he interest in the privacy of the home . . . has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him."). Bartholomew's intentions were clear. Callahan knew this was no mere social visit. J.A. 368-71. And Callahan did in fact distribute the methamphetamine to Bartholomew, as he admitted when he pled guilty to the crime of distributing methamphetamine in his 2002 state trial. J.A. 303-12.[6]

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[6] Callahan pled guilty to distributing methamphetamine in 2002. J.A. 303-12. That guilty plea is part of the record for summary judgment. *Hope*, 536 U.S. at 733 n.1. In his 2006 affidavit, however, Callahan denied selling any methamphetamine on that day. J.A. 379. Callahan acknowledged that he knew Bartholomew wanted to buy drugs and that Bartholomew did buy drugs when inside Callahan's home, but he denied observing the transaction himself. J.A. 376-80.

It is unclear whether Callahan's statements in his 2006 deposition directly contradict his 2002 guilty plea. However, to the extent Callahan's statements in 2002 and 2006 are inconsistent, the principle of judicial estoppel prohibits Callahan from taking a contrary position in 2006. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001); 18 MOORE'S FEDERAL

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In these circumstances, petitioners' entry into Callahan's home did not invade any legitimate privacy interest. Before the officers' entry, an agent of the state was present inside the home. That agent was broadcasting the sound inside the trailer to the officers waiting outside. The officers' entry into the trailer merely added to the number of government agents there. Critically, the officers' entrance did not expose any additional area of the inside of the home to government observation. What was private before remained private. What was exposed before remained exposed. The fact that the officers entered the home did not violate any additional privacy interest that was not already waived by Callahan's admission of Bartholomew inside the home to sell him illegal narcotics. No warrant was necessary in these circumstances.

PRACTICE § 134.30, p. 134-62 (3d ed. 2000). Callahan cannot plead guilty to receive the benefits of a plea agreement in a criminal case and then bring a lawsuit against the officers in which he denies the essential facts that supported his guilty plea. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

Notably, the officers took careful steps to confirm that Bartholomew had in fact been admitted inside the home to purchase narcotics. Before entering Callahan's home, the officers gave Bartholomew a "wire" so they could listen in on what transpired inside. They listened in as Bartholomew made small talk, purchased the meth, and then gave the prearranged signal by talking about "playing the drums." By that point, there could be little question that Callahan had in fact "converted [his home] into a commercial center to which outsiders are invited for purposes of transacting unlawful business." *Lewis*, 385 U.S. at 211. *Cf. Minnesota v. Carter*, 525 U.S. 83, 90 (1998) ("Property used for commercial purposes is treated differently for Fourth Amendment purposes than residential property."); *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (same). Callahan was no doubt surprised when the officers entered. However, the entry after Bartholomew gave the prearranged signal violated no expectation of privacy "that society is prepared to accept . . . as objectively reasonable." *California v. Greenwood*, 486 U.S. 35, 40 (1988).

The Fourth Amendment rules that permit government reenactment of private searches reaffirm these principles. When a private person not regulated by the Fourth Amendment conducts a search, the exposure by the private person frustrates the defendant's Fourth Amendment expectation of privacy against government observation. *See United States v. Jacobsen*, 466 U.S. 109, 117-22 (1984). "Once frustration of the original expectation of privacy occurs,"

what was exposed to the private party "no longer support[s] any expectation of privacy." *Id.* at 117, 120, n.17. *See also Walter v. United States*, 447 U.S. 649, 657 (1980) (Opinion of Stevens, J.). At that stage, government agents can reenact the prior search so long as they limit themselves to the areas and the information already observed by the private party. Any "additional invasions" by the government are "tested by the degree to which they exceeded the scope of the private search," and "the Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Jacobsen,* 466 U.S. at 115, 117.

The same principle applies to the officers' entry into Callahan's trailer. In the private search cases, the initial entry does not trigger the Fourth Amendment because private actors are not regulated by the Fourth Amendment; in the current case, the initial entry did not trigger the Fourth Amendment because Bartholomew was an invited guest. In both cases, the same rules govern the subsequent reenactment of the search by the police. Bartholomew's initial entry frustrated Callahan's reasonable expectation of privacy much like a private search. So long as Bartholomew was inside the home, the officers could enter Callahan's trailer just as Bartholomew had entered. Testing the officers' "additional invasion . . . by the degree to which they exceeded the scope" of the earlier entry reveals that no additional exposure occurred. *Jacobsen*, 466 U.S. at 115. Because the

officers' entry into the home recreated Bartholomew's entry, it did not obtain "information with respect to which the expectation of privacy has not already been frustrated" and did not invade any legitimate expectation of privacy. *Id.* at 117.

B. If the officers' entry was a Fourth Amendment search, it was a reasonable search because it assisted in and was incident to Callahan's arrest for distributing methamphetamine.

Alternatively, if the officers' entry violated Callahan's reasonable expectation of privacy and was therefore a Fourth Amendment search, it was a reasonable search and thus a constitutional one. The execution of a valid arrest under the Fourth Amendment renders some searches and seizures constitutionally reasonable. Those powers exist to help "disarm the suspect in order to take him into custody" and "to preserve evidence for later use at trial," *Knowles v. Iowa*, 525 U.S. 113, 116 (1998), as well as more generally "to ensure . . . the integrity of the arrest," *Washington v. Chrisman*, 455 U.S. 1, 7 (1982). The power to search incident to arrest usually is exercised after the arrest, but the same power exists before the arrest when probable cause has been established and the arrest is imminent. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the

challenged search . . . , we do not believe it particularly important that the search preceded the arrest rather than vice versa.").

The authority of the police to ensure the safety and integrity of an arrest permitted the officers to enter Callahan's home in the circumstances of this case. At the moment the officers entered, an agent of the state inside Callahan's home had personally observed Callahan distributing methamphetamine. The Fourth Amendment permits an agent of the state to make an arrest if he has probable cause to believe that even a minor crime has been committed in his presence. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Bartholomew was an agent of the state working under a formal contract with the Task Force, J.A. 49, and he plainly had probable cause to make an arrest after he made his purchase. Under his arrangement with the officers, Bartholomew did not try to arrest Callahan himself. Instead, he put the arrest in motion by giving the signal to the officers waiting outside. The officers then entered to do the job of executing the arrest while Bartholomew pretended to be a target rather than a government agent.

The officers' entry into Callahan's home is analogous to the warrantless home entry approved by this Court in *Washington v. Chrisman*, 455 U.S. 1 (1982). In *Chrisman*, a police officer at Washington State University observed a student leaving a university dormitory with a bottle of gin. The officer suspected that the student was too young to legally possess alcohol, so he stopped the student and asked him for

ID. The student responded that his ID was in his dorm room, and he asked the officer if the officer would wait while the student retrieved it. The officer declined the request and explained to the student that he would have to accompany the student to the dorm room. *See id.* at 3. When the officer and the student arrived at the dorm room, the officer entered and seized narcotics in plain view inside the room.

The Court held that the officer's unconsented entry into the dorm room was constitutionally reasonable. According to the Court, the officer had placed the student under lawful arrest, and the lawful arrest gave the officer the power to follow the student inside his home "literally at [the student]'s elbow at all times." *Chrisman*, 455 U.S. at 6. This rule followed both from the need to protect officer safety and to "protect . . . the integrity of the arrest." *Id.* at 7. The Court explained that "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious." *Id.* Given these "compelling" interests, an officer's entry into the home of a person following his arrest was "not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested." *Id.*

The same principles permitted the officers to enter Callahan's home. As in *Chrisman*, the officers entered the home both to protect the safety of state actors and to protect the integrity of the arrests. It

would have been foolhardy to ask Bartholomew (or a single undercover officer making the purchase) to make the arrests himself after the undercover purchase. Making an arrest is a "dangerous and difficult process," *Maryland v. Garrison*, 480 U.S. 79, 87 (1987), and the interest in safety is compelling. The individual or individuals being arrested may try to resist or escape. Further, a person making an arrest will not know if there are other co-conspirators in the home who can harm him during the arrest. As the Court recognized in *Maryland v. Buie*, 494 U.S. 325 (1990), officers have a strong interest in "taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter." *Id.* at 333. That concern is particularly clear in a case such as this: the officers arrested several individuals, not just one. One individual could not make all of those arrests safely and effectively on his own.

Finally, there were obvious reasons for Bartholomew not to participate in the arrests directly and to leave that entirely to the officers. Bartholomew had no training in making arrests. It would have been strange to ask him to participate in the arrests with several highly trained and experienced officers present. Second, it was important to the investigation to keep Bartholomew's status as an

informant a secret for as long as possible. As soon as an informant's status is revealed, the informant is no longer effective and can sometimes face threats from those engaged in criminal activity. For that reason, the officers' plan included pretending to arrest Bartholomew when they actually arrested Callahan and others participating in narcotics offenses inside Callahan's trailer. J.A. 65-66, 68-69. In those circumstances it was reasonable for Bartholomew to put the arrest in motion and for the officers to then enter the home incident to arrest and make the arrests themselves.

The constitutional reasonableness of the officers' entry is bolstered by the reality that permitting police to enter without a warrant in these circumstances will lead to less invasive searches than would occur if police obtained a warrant. If police officers are not permitted to enter without a warrant to assist in the arrest in these cases, the most likely alternative would be for officers to obtain an anticipatory search warrant under *United States v. Grubbs*, 547 U.S. 90 (2006).[7] The anticipatory search warrant presumably

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[7] An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(c), p. 398 (4th ed. 2004). Such warrants "require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed." *Grubbs*, 547 U.S. at 96.

would be triggered when the informant gives the signal; at that point the officers would enter the home under the warrant. Although obtaining an anticipatory search warrant to justify entry is clearly constitutional, it will lead to significantly more invasive searches. The execution of a search warrant for narcotics is tremendously invasive. The warrant lets the officers search anywhere in the home for drugs, and drugs can be located anywhere. When officers execute a warrant for narcotics, interiors can be turned upside down. Cabinets and drawers are emptied, and furniture is often ripped open and sometimes broken. Although a particularized warrant will not permit a general search on its face, the reality that drugs can be stored nearly anywhere means that the resulting search will look a great deal like a search under a general warrant in practice.

In contrast, officers cannot conduct such invasive searches when they enter without a warrant to assist with an arrest. Upon entering without a warrant, the officers have no general authority to search the home. *See Chimel v. California*, 395 U.S. 752, 764-65 (1969). Rather, they can only conduct specific types of searches and seizures pursuant to carefully delineated exceptions to the warrant requirement. The officers can conduct a protective sweep under *Maryland v. Buie*, 494 U.S. 325 (1990); they can also conduct a search incident to arrest of the "grabbable area" around the suspect under *Chimel*; and they can inquire as to whether the target will consent to a search. However, they cannot exceed these powers

and search more broadly without a warrant.[8] Further, there is no room for error in the warrantless context: if the police erroneously search more than the law allows, no "good faith" rule will apply that limits the scope of suppression of evidence. *But see United States v. Leon*, 468 U.S. 897 (1984) (adopting a good faith exception for searches pursuant to warrants). These limitations on warrantless searches will tend to produce significantly less invasive searches if the police can enter without a warrant to assist with arrests than if they enter based on the authority of an anticipatory search warrant.[9]

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[8] The government may also have greater powers to search in cases, including this one, where the target is already under judicial supervision and has yielded some or all of his Fourth Amendment rights pursuant to a parole agreement. *See* J.A. 391-94 (Parole Agreement). *Samson v. California*, 547 U.S. 843 (2006), establishes that a search condition agreed to by a parolee is an important factor in the totality of the circumstances of whether a search of a parolee is reasonable. *See also United States v. Knights*, 534 U.S. 112, 118 (2001) (permitting warrantless search of a probationer's apartment).

[9] Alternatively, the police could attempt to obtain an anticipatory arrest warrant instead of an anticipatory search warrant. The *Grubbs* case does not address whether the Fourth Amendment permits anticipatory arrest warrants, but it seems at least possible that such warrants could exist. If such warrants are permitted, however, their availability would not lead to less invasive searches because any rational officer would also obtain an anticipatory search warrant.

This is true for three reasons. First, if some kind of warrant is required, a search warrant may be needed in addition to an arrest warrant under *Steagald v. United States*, 451 U.S. 204 (1981). Second, in the case of a planned undercover drug buy,

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C. The Tenth Circuit's distinction between police officers and informants is unpersuasive and should be rejected.

The Tenth Circuit held that the law must recognize a distinction between police entry following an undercover entrance by a police officer versus entry following an undercover entrance by an informant. *Callahan*, 494 F.3d at 896-97. The panel based this distinction on two apparent grounds. First, the Tenth Circuit contended that the scope of a suspect's consent is different if he admits an undercover officer than if he admits an informant. Second, the Tenth Circuit reasoned that the police had "distinct obligations and powers," that required distinct rules.

Neither argument is persuasive. The scope of consent cannot provide a basis to distinguish between officers and informants because the suspect always will be unaware of the difference. When a drug dealer admits a potential buyer inside his home, he will not know whether he has admitted a real customer, a confidential informant, an undercover police officer, or a TV reporter working on a story. He will hope the person he admits is simply a drug user looking for a

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officers will be able to establish probable cause to search the location much more easily than they can establish probable cause to arrest specific people. The fact that an illegal transaction occurred will be easy to prove, whereas a specific person's involvement in the buy may be significantly more difficult to show. Finally, officers presumably will want to give themselves more authority rather than less.

fix. But he cannot know for sure. In light of that uncertainty, it would be quite odd if the status of the undercover, learned *ex post*, somehow defined the scope of his consent and therefore the rights of officers waiting outside to enter. The Court held in *Florida v. Jimeno*, 500 U.S. 248, 251 (1991), that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" The employment status of an undercover operative has no role in this inquiry.

Second, the Tenth Circuit's reliance on the distinction between the "powers and obligations" of police and informants has no basis in history, current Fourth Amendment doctrine, or common sense. As a matter of history, the distinction between professional officers and private citizens acting for the police is a modern concept; professional police were not known until the 19th Century. *See Crawford v. Washington*, 541 U.S. 36, 53 (2004) (citing 1 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 194-200 (1883)). At common law, before the creation of professional police forces, private citizens frequently played an active role in making arrests and conducting investigations. *See generally* M. CHERIF BASSIOUNI, CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE 6-13 (1977) (detailing the powers and obligations of

private citizens to make arrests and participate in investigations under the English common law).

Many of those powers exist today in the United States, although they are exercised less often than in the past. By 1976, thirty-one states had enacted legislation permitting citizen's arrests; most of the statutes permit a private citizen to make an arrest for a felony or for any other crime committed in his or her presence. *Id.* at 14-15, 87-95. Utah is one such state: Utah Code Ann. § 77-7-3 (2003) provides that "[a] private person may arrest another: (1) For a public offense committed or attempted in his presence; or (2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it." Under Utah's statute, as under the law of most states, an informant such as Bartholomew has the same power to arrest a suspect for a crime committed in his presence as does a professional police officer.

Second, any alleged differences between the "powers and obligations" of informants and undercover officers are creatures of state law that are irrelevant to Fourth Amendment reasonableness under *Virginia v. Moore*, 128 S.Ct. 1598 (2008). In *Moore*, Virginia police officers arrested the defendant for driving on a suspended license and then found crack cocaine on his person following a search incident to arrest. The defendant argued that the arrest was constitutionally unreasonable because it was in violation of state law that prohibited arrests for this particular misdemeanor crime. *See id.* at 1605-06.

The Court held that state law obligations placed on professional police officers had no significance under the Fourth Amendment: "A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional." *Id.* at 1606. Under that reasoning, any differences in the "powers and obligations" of the police and informants are matters of state law that have no relevance under the Fourth Amendment.

Third, creating a legal distinction between an initial entry by an undercover officer and one by a confidential informant defies common sense. An agent of the state is an agent of the state, regardless of whether that agent is working with the government pursuant to an informant contract or an employment contract. As far as counsel is aware, no relevant case has suggested the distinction. Fourth Amendment decisions have traditionally treated the two as the same. *Compare Lewis v. United States*, 385 U.S. 206 (1966) (entry by undercover agent) with *Hoffa v. United States*, 385 U.S. 293 (1966) (entry by informant, handed down the same day as *Lewis*). If anything it makes more sense for the police to enter to assist after they send in an informant. An informant lacks formal training and is less able to handle law enforcement duties on his own.

Finally, if a line must be drawn between the police and informants, exactly where will it be

drawn? Is it sufficient if the officer gives the informant a shiny badge that says "police officer"? Is it sufficient if the officer announces that he is "deputizing" the informant? Do informants need training at the police academy, and if so, for how long? No clear lines exist, making the distinction a poor choice for a Fourth Amendment rule. For all of these reasons, the Tenth Circuit's distinction between the rules for entry in cases involving informants and police officers should be rejected.

D. *Georgia v. Randolph* is not relevant because Bartholomew clearly lacked "common authority" over Callahan's house and could not provide third-party consent to search.

In his opinion for the District Court, Judge Cassell suggested that the Court's recent opinion in *Georgia v. Randolph*, 547 U.S. 103 (2006), might signal that the Court "may not be receptive" to authorizing the officers' entry into Callahan's home. Pet. App. 52. However, *Randolph* presents a very different question. Properly understood, *Randolph* is not relevant to this case because the officers' entry was permitted under the specific, time-sensitive doctrines of waiver and search incident to arrest rather than the general principle of third-party consent.

Randolph involved the third-party consent doctrine, a Fourth Amendment rule that permits individuals with "common authority" over property

shared with a target to consent to a police search designed to uncover the target's incriminating evidence. *United States v. Matlock*, 415 U.S. 164, 171 (1974). The *Matlock* Court explained: "The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at n.7.

In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court applied this doctrine in a case involving a wife's consent to search a home in the presence of her nonconsenting husband. The Court held that it was not reasonable to rely on the wife's permission to enter in light of the "physically present inhabitant's express refusal of consent." *Id.* at 123. If the husband had been absent, the wife's consent would have permitted the officers' entry; it would have been reasonable to rely on her consent in that case. *See id.* at 122. However, the husband's presence required a different result: "widely shared social expectations" established that it was unreasonable to enter a home when one occupant urges the entry and the other occupant is present and rejects permission for it. *Id.* at 111-16.

Randolph is not relevant in this case because Bartholomew clearly lacked common authority to consent to a government search of Callahan's trailer. Unlike Mr. and Mrs. Randolph, Callahan and Bartholomew were not on equal footing. Bartholomew was just a customer, not a resident. He was not a "co-inhabitant" who had "mutual use of the property . . . generally . . . for most purposes," *Matlock*, 415 U.S. at 171 n.7, but rather a undercover informant who had only a temporary presence inside the home for the period of his entry to buy methamphetamine. That temporary presence could not establish common authority, because common authority necessarily requires a long-term relationship between the third party and the property. As a result, it does not matter whether Callahan was present at the door at the time of the officers' entry or whether Callahan tried to object. Nor does the Court need to consider "widely shared social expectations" among drug dealers and their customers during an illegal sale.

In fact, Bartholomew lacked any Fourth Amendment rights *at all* in Callahan's home, much less common authority to consent to a government search of the home. Under *Minnesota v. Carter*, 525 U.S. 83 (1998), an individual who enters a home as a guest to engage in narcotics dealing has no Fourth Amendment rights in the home. Because Bartholomew had no Fourth Amendment rights in the home, it would not have been reasonable for the officers to rely on Bartholomew's willingness to waive those rights to justify their entry.

II. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE IT WAS NOT CLEARLY ESTABLISHED THAT THEIR ENTRY VIOLATED THE FOURTH AMENDMENT.

If the Court holds that the officers' entry violated the Fourth Amendment, the Court should nonetheless reverse the Tenth Circuit because the officers are entitled to qualified immunity. At the time of the officers' entry, existing caselaw indicated that the entry was constitutional. Several circuits had adopted a test that rendered the entry constitutional, and Judge Posner's decision for the Seventh Circuit in *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986), had embraced this test for cases using informants. As far as counsel is aware, no court had taken a different view; it appears that every Fourth Amendment decision that considered the lawfulness of follow-up entries in undercover buy investigations had permitted the officers' entries without a warrant. As a result, the entry into Callahan's home did not violate a clearly established right and the officers are entitled to qualified immunity.

An officer conducting a search is entitled to qualified immunity if "a reasonable officer could have believed" that the search was lawful "in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526

U.S. 603, 614 (1999). The Court has stressed that "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson,* 483 U.S. at 639. If the relevant right that is "clearly established" is merely the right to be free from unreasonable searches and seizures – that is, the Fourth Amendment itself, stated at the most general level – then qualified immunity becomes meaningless. *Id.* Greater specificity is required: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640 (internal citations omitted). In other words, "the unlawfulness must be apparent." *Id.*

The officers are entitled to qualified immunity under this standard. Taken at a proper level of generality, the question is whether an officer could reasonably believe that he could lawfully enter without a warrant when a suspect had admitted a confidential informant into his home to purchase illegal drugs, the informant had purchased drugs, and the informant had then signaled the completion of the purchase to the officers waiting outside. *Accord Callahan*, 494 F.3d at 903 (Kelly, J., dissenting) ("Properly characterized, the right at issue . . . is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause.").

The answer to that question is "yes." At the time the arrest in this case occurred, a body of caselaw had developed in the lower courts grouped together as the doctrine of "consent once removed." This doctrine had been considered by three federal circuits and two state supreme courts starting in the early 1980s, and it had been accepted by every one of those courts and rejected by none. *See, e.g., United States v. Janik*, 723 F.2d 537 (7th Cir. 1983); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994). The doctrine was generally stated as a three element test:

> The doctrine of "consent once removed" is applicable where the undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers.

United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995).

This formulation seems to have first appeared in *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987), intended as a summary of prior Seventh Circuit cases permitting what Judge Flaum called "second entry." The earlier Seventh Circuit cases had in turn relied on two different sources of authority. *United States v. White*, 660 F.2d 1178, 1883 (7th Cir.

1981), had relied on the Supreme Court's decision in *Lewis v. United States*. On the other hand, *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983), appears to have been based on the power to search incident to arrest. The dual theories underlying the Seventh Circuit's "second entry" cases are understandable: as explained in Section I of this brief, the officers' entry in such cases can be justified on either theory and leads to essentially the same result. Although the history of the development of the so-called "consent once removed" doctrine is not entirely clear, it appears to have developed as a three-element test in an effort to summarize Seventh Circuit precedents that were based both on *Lewis* and on search incident to arrest. The test then spread to other courts.

By the time the search in this case occurred in 2002, the many cases announcing and applying the "consent once removed" doctrine had crystallized into a reasonably settled doctrine that formed part of the general backdrop of Fourth Amendment rules. By 1996, Professor LaFave's influential Fourth Amendment treatise noted the doctrine in a discussion of the legal basis for entry into a home to make an arrest:

> [I]t has frequently been held that no warrant is needed where the arrest is made within premises to which an undercover police officer gained admittance by indicating his interest in participating therein in criminal activity. That result is not surprising, as it squares with analogous Supreme Court and

> lower court decisions on the use of undercover agents.

3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1(c) at 246-47 (3d ed. 1996). The first sentence above was followed by a footnote exploring the "consent once removed" cases specifically, citing the string of Seventh Circuit cases as "some authority" for the doctrine and excerpting the discussion from *Diaz*. *Id.* at n.100. The second sentence was followed by a footnote referring to the Section of LaFave's treatise on undercover agents that featured an extensive discussion of *Lewis v. United States*. *See id.* at § 8.2(m).

The cases on "consent once removed" were also sufficiently established that they were the subject of a law journal article that aimed to give legal guidance to law enforcement officers and that likely was written at about the same time as the entry into Callahan's trailer. *See* Edward M. Hendrie, *Consent Once Removed*, FBI LAW ENFORCEMENT BULLETIN 24-32 (February 2003), available at http://www.fbi.gov/publications/leb/2003/feb03leb.pdf. Notably, neither Professor LaFave nor the Hendrie article suggested at the time that the "consent once removed" doctrine was something questionable or odd. To the contrary, Professor LaFave described the results in those cases as "not surprising," and noted that such outcomes "square[] with analogous Supreme Court and lower court decisions on the use of undercover agents." LAFAVE, *supra*, at § 6.1(c) (1996 ed.).

Further, there was no indication in 2002 that the doctrine might not apply when the initial entry was made by a confidential informant rather than an undercover officer. To the contrary, that distinction had been rejected by an early circuit court case that directly raised the issue, *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986), authored by Judge Richard Posner. Judge Posner concluded that it made no difference that an initial entry is made by a confidential informant:

> We think the principle extends to the case where the initial, consensual entry is by a confidential informant. The interest that the *Payton* decision protects is the interest in the privacy of the home, and has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him. It makes no difference that the owner does not know he is dealing with an informant.

Paul, 808 F.2d at 648. The conclusion in *Paul* was then incorporated into the Seventh Circuit's standard formulation of the exception the next year in *Diaz*, *see Diaz*, 814 F.2d at 459, which was then widely copied in other Seventh Circuit cases. By 2002, when the entry into Callahan's house occurred, the authorities relied on *Paul* much like the other cases. *See* Hendrie, *Consent Once Removed*, at 24-25 ("There is no requirement that the person obtaining the original consent be an officer of the law. The person obtaining consent could be an informant."); LAFAVE, *supra*, at § 6.1(c) n.100 (1996 ed.) (citing *Paul*).

In light of these cases, the officers were not violating clearly established law when they entered Callahan's trailer without a warrant on March 19, 2002. Circuit court precedents going back almost twenty years had concluded that such entries were constitutional. Those precedents had not been rejected in the intervening years. To the contrary, other courts and commentators had accepted those decisions when they arose. In that setting, it was reasonable for an officer to rely on the existing cases and authorities to conclude that a warrantless entry was constitutional.

The fact that the Tenth Circuit had not yet considered the "consent once removed" doctrine does not mean the officers' reliance on existing caselaw was any less reasonable. Police officers are not legal scholars. An officer in Fillmore, Utah (population 2,253) should not have to second-guess the legal analysis of Richard Posner. Nor should he have to wonder whether there are difficult Fourth Amendment issues that Professor LaFave's treatise has overlooked. Police officers cannot be expected to predict that the federal circuit in which they work will create a circuit split – or that if a split is created the Supreme Court will take the case and reject the lower court's caselaw.

The Tenth Circuit's contrary analysis provides a textbook example of how not to analyze qualified immunity. The Tenth Circuit committed the fundamental error of construing the relevant right as broadly as possible: "In this case, the relevant right

is the right to be free in one's home from unreasonable searches and arrests." *Callahan*, 494 F.3d at 898. As explained in *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), discussed *supra*, this is plainly incorrect. Next, the Tenth Circuit stated that the Supreme Court had already adopted a position that there can be only two exceptions to the warrant requirement for home searches: "the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Callahan*, 494 F.3d at 898.

The Tenth Circuit's claim that only two exceptions to the warrant requirement allow entry into a home is based on a misreading of the relevant caselaw. There are several more such exceptions – the total number is unclear – and more importantly, their contours are often undefined. As Justice Thomas noted after reviewing the Court's decisions on exceptions to the warrant requirement, "our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not." *Groh v. Ramirez*, 540 U.S. 551, 572-73 (2004) (Thomas, J., dissenting). Even the Tenth Circuit case cited by the *Callahan* majority noted three exceptions, not two. *Franz v. Lytle*, 997 F.2d 784, 788 (10th Cir. 1993). The Supreme Court had recognized still more exceptions in the home context, such as entries incident to a lawful arrest in *Washington v. Chrisman*, 455 U.S. 1 (1982), and warrantless entries into the apartments of probationers in *United States v.*

Knights, 534 U.S. 112 (2001). The Court has also permitted warrantless home entries on a waiver theory that does not require an exception to the warrant requirement because no reasonable expectation of privacy has been violated. *See, e.g., United States v. White*, 401 U.S. 745, 752 (1971). The Tenth Circuit's claim that warrantless home entries must either be justified by consent or exigent circumstances or else not at all is simply incorrect.

More fundamentally, the Tenth Circuit's formulation improperly looks at legal categories instead of the objective reasonableness of an application of law to a set of facts. The proper question asks whether the illegality of the officers' entry was clearly established, not the precise number of exceptions to the warrant requirement that courts can catalog in the abstract. The officers' entry in this case fits readily under both the Supreme Court's preexisting reasonable expectation of privacy cases and its search incident to arrest cases. *See* pages 20 to 39, *supra*. No new exception to the warrant requirement is needed. But what matters is whether the illegality of the entry was apparent, not whether the Court categorizes the entry under an existing doctrine or a new one.

Groh v. Ramirez, 540 U.S. 551 (2004), provides no support for the view that the officers do not deserve qualified immunity. In *Groh*, the officers obtained and executed a faulty warrant that failed to describe the property to be seized. When the homeowner sued the police for executing the illegal warrant, the officers claimed that they were entitled to

qualified immunity because they could have reasonably believed that their entrance pursuant to a faulty warrant was constitutional. The Court disagreed, noting that there was no basis in existing caselaw for thinking that the search pursuant to a faulty warrant nonetheless satisfied the Fourth Amendment: "Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." *Id.* at 565.

The result in *Groh* has been criticized,[10] but properly understood *Groh* stands for a simple and even obvious proposition: it is not reasonable for the police to believe that a warrantless search of a home satisfied the Fourth Amendment if there is no legal support for that view. That reading is confirmed by the Court's contrasting decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, Attorney General John Mitchell authorized a warrantless wiretap of a radical domestic group from late November 1970 until early January 1971. Mitchell relied on the untested theory that the Fourth Amendment recognized an exception for domestic security wiretapping. Two years later, in *United States v. United States*

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[10] *See* 1 W. LAFAVE, SEARCH AND SEIZURE, § 1.3(f) (4th ed. 2004) (2007 Supp.) (describing the qualified immunity analysis in *Groh* as "flat-out wrong").

District Court for Eastern Dist. of Mich., Southern Division, 407 U.S. 297 (1972), a case widely known as the *Keith* case, the Supreme Court rejected the Attorney General's theory and held that such monitoring required a warrant. Forsyth then sued Mitchell, and the issue before the Court was (among other things) whether Attorney General Mitchell was entitled to qualified immunity for authorizing the illegal wiretap.

This Court concluded that the Attorney General was entitled to qualified immunity because then-existing precedents and authorities left unclear whether a domestic security exception existed. *See Mitchell*, 472 U.S. at 530-35. To reach this conclusion, the opinion began by surveying the evolution of general Fourth Amendment doctrine. *See id.* at 530-32. The opinion then discussed three district court decisions handed down from July 1969 through September 1970 that had adopted the Attorney General's position to varying degrees. *Id.* at 533. After surveying this landscape, the Court concluded that the Attorney General had not acted unreasonably in concluding in late 1970 that the domestic security exception did in fact exist and that the monitoring was therefore legal:

> [T]o say that the principle *Keith* affirmed had already been "clearly established" is to give that phrase a meaning that it cannot easily bear. The legality of the warrantless domestic security wiretap Mitchell authorized in November 1970, was, at that time, an open question, and *Harlow* teaches that

> officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted.

Mitchell, 472 U.S. at 534-35. In a footnote, the Court added:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.

Id. at 535, n.12.

The *Mitchell* Court looked carefully at the entirety of the caselaw on the specific issue that the Attorney General decided. It looked at all courts, including individual district courts. It then considered whether the Attorney General acted unreasonably in assessing the legality of the warrantless wiretap. The same approach should be followed in this case, and it leads to the conclusion that the officers acted reasonably in believing that their entry satisfied the Fourth Amendment. Unlike in *Groh*, there was a great deal of support for the view that the officers' entry satisfied the Fourth Amendment. That support included Supreme Court cases like *Lewis* and *Chrisman* as well as lower court cases on "consent

once removed" such as Judge Posner's decision in *Paul*. The weight of caselaw made the legality of the entry at the very least a "legitimate question," *Mitchell*, 472 U.S. at 535, n.12, and therefore triggers the doctrine of qualified immunity.

Brosseau v. Haugen, 543 U.S. 194 (2004) (per curiam), provides a helpful example of how lower court cases outside an officers' home circuit can inform the scope of qualified immunity. Puyallup, Washington police officer Rochelle Brosseau shot Kenneth Haugen in the back as he attempted to flee. Haugen sued Officer Brosseau, and the Ninth Circuit concluded that Brosseau had violated Haugen's clearly established constitutional rights. The Supreme Court summarily reversed in a *per curiam* opinion. The Court began by looking at the relevant Supreme Court opinions, but concluded that those opinions provided only general guidance. *See id.* at 199. The Court then looked to lower court opinions, canvassing decisions from the Sixth Circuit, the Seventh Circuit, and the Eighth Circuit. Those lower court decisions did not clearly establish that Brosseau had violated Haugen's rights, the Court concluded: "These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the hazy border between excessive and acceptable force." *Id.* at 201 (internal quotation omitted).

If circuit court decisions from other circuits were relevant in *Brosseau*, then surely they are relevant in this case. If anything, the officers' entitlement to qualified immunity is clearer here than in the *per curiam* opinion in *Brosseau*. The circuit court opinions in this case do not depend on the facts of each case, and they do squarely govern the case here. Those cases indicate that the officers' entry satisfied the Fourth Amendment. If this Court disagrees, then the officers are entitled to qualified immunity.

III. IN THE FOURTH AMENDMENT SETTING, *SAUCIER V. KATZ* SHOULD BE LIMITED OR OVERRULED

The Court's order granting the petition directed the parties to brief and argue the following question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?" *Pearson v. Callahan*, 128 S.Ct. 1702 (2008). In *Saucier*, this Court formalized its rule on the order of decision-making in constitutional tort cases that combine constitutional questions and qualified immunity claims. The *Saucier* rule is that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged," and that "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201.

The petitioners respectfully submit that the one-size-fits-all rule of *Saucier* is well-intentioned but overbroad. The rule should be narrowed. The difficult question is precisely how: changing the law under *Saucier* requires replacing it with an alternative. The petitioners submit that the Court should approach the question cautiously, and that in this case the Court should only resolve the 'order of battle' for Fourth Amendment claims. Specifically, the petitioners submit two alternative rules that would be superior to the status quo in Fourth Amendment cases. The first proposed rule would abandon *Saucier* in Fourth Amendment civil suits. The second proposed rule would limit the *Saucier* order to Fourth Amendment claims that do not involve fruit of the poisonous tree. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963).

At the broadest level, the order of decision-making in qualified immunity cases requires the Court to accommodate two important but often competing interests. The first interest is the clarity of the law. Constitutional law often develops in a case-by-case fashion, and that law may be unclear if courts repeatedly resolve civil disputes without first reaching the merits. This was the primary concern underlying the Court's opinion in *Saucier*. *See Saucier*, 533 U.S. at 201 ("The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."). On the other hand, the second interest is

avoiding unnecessary constitutional rulings that burden the courts and may create precedents of uneven quality that are difficult to review. That is the primary concern voiced by *Saucier's* critics. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275-81 (2006).

Counsel submits that *Saucier's* primary weakness is that it accommodates these two interests with a single one-size-fits-all rule for all constitutional torts. In every case, in every area, the same order must be followed. But different areas of law and different types of claims implicate these concerns in different ways. Some areas of law are generally murky, while others are often relatively clear. Some areas are frequently litigated, and others reach the courts only rarely. Some areas of law arise in many different types of cases, while others arise only in civil suits protected by qualified immunity. The best way to accommodate the basic interests raised by the 'order of battle' varies in different types of cases. As a result, a more finely-grained approach would be superior to *Saucier's* one-size-fits-all rule.

Counsel respectfully submits that two alternative approaches would be superior to *Saucier*. First, the Court could rule that the *Saucier* order is not required in Fourth Amendment cases, leaving open for now the question of whether it should be retained in other types of constitutional tort suits. The reason is that civil litigation has only a minor role in developing Fourth Amendment law. Fourth Amendment

decisions arise with tremendous frequency in the context of motions to suppress in criminal cases. Under *Gideon v. Wainright*, 372 U.S. 335 (1963), and its progeny, every criminal defendant who faces jail time will be represented by an attorney; under *Mapp v. Ohio*, 367 U.S. 643 (1961), the Fourth Amendment exclusionary rule is available both in federal and state court. The combination of *Gideon* and *Mapp* ensures that the Courts encounter a vast number of Fourth Amendment claims in criminal cases that develop the law outside of civil suits. If the Court wishes to select a single rule to govern whether the *Saucier* order is required in Fourth Amendment cases, the better rule should be that it is not.

Alternatively, the Court should consider a second proposal that is more finely-grained. In Fourth Amendment cases, the *Saucier* order should be limited to claims that do not involve alleged fruits of the poisonous tree, *Wong Sun v. United States*, 371 U.S. 471 (1963), and therefore will not arise in the context of motions to suppress. This approach recognizes that all Fourth Amendment claims are not created equal: some claims arise often in motions to suppress but others do not. The most important example of important claims that rarely arise in suppression cases involves excessive force claims. Excessive force claims are premised on the view that an unnecessary use of force by the police against a citizen constitutes an unreasonable seizure of his person in violation of the Fourth Amendment. *See generally Graham v. Connor*, 490 U.S. 386 (1989). Such claims rarely if ever arise

in criminal cases: because an officer's use of excessive force does not ordinarily lead to the discovery of evidence, a defendant cannot claim that the evidence was a "fruit" of the excessive use of force.

In the Fourth Amendment area, the *Saucier* rule is quite important to the development of the law in areas that do not arise in motions to suppress. The example of excessive force – the cause of action in *Saucier* itself – is instructive. Because the use of the Fourth Amendment to adjudicate excessive force claims is a recent development, *see Graham*, 490 U.S. at 392, the relevant legal standards governing excessive force have often remained unclear. Before *Saucier*, it was easy and common for judges to take the short cut of resolving excessive force claims by relying on the qualified immunity prong in a way that left the law just as murky as it had been before. *Cf. Saucier*, 533 U.S. at 206 (noting the "hazy border between excessive and acceptable force"). A difficult Fourth Amendment issue would normally coincide with a simple qualified immunity question, giving courts an incentive to resolve difficult excessive force claims without directly addressing the Fourth Amendment line. *Saucier* has helped settle the law by requiring courts to clarify the legal standards governing excessive force.

A new rule limiting *Saucier* to claims that do not involve fruits of the poisonous tree would require courts to consider whether the challenged act was the proximate cause of the discovery of criminal evidence. In cases where the challenged act did not lead to the

discovery of evidence, courts would still be required to follow the *Saucier* order. For example, courts would be required to apply *Saucier* in cases raising excessive force claims; traffic stops that did not lead to the discovery of evidence; arrests not based on probable cause; failure to provide a hearing within a reasonable period of time after arrests under *Gerstein v. Pugh*, 420 U.S. 103 (1975); knock-and-announce violations, *see Hudson v. Michigan*, 547 U.S. 586 (2006); and other similar claims. On the other hand, courts could go straight to a qualified immunity analysis if the challenged act revealed evidence of criminal activity and could therefore be adjudicated in a motion to suppress.

Under either of these proposed tests, the Court would not be required to apply the *Saucier* order to resolve the officers' entry into Callahan's home. Under the first test, *Saucier* would not apply because Callahan brought his claim under the Fourth Amendment. Under the second, more specific test, *Saucier* would not apply because the officers' entry led to the discovery of criminal evidence including methamphetamine and syringes.

CONCLUSION

The judgment of the court of appeals should be reversed.

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RESPONDENT'S BRIEF

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IN THE
Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE, DWIGHT JENKINS, CLARK THOMAS, AND JEFFREY WHATCOTT,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether police officers may enter a home without a warrant on the ground that, by consenting to the entry of a confidential informant into the home, the owner has consented to entry by the police.

2. Whether Petitioners are entitled to qualified immunity from liability under 42 U.S.C. § 1983.

3. Whether the Court's decision in *Saucier* v. *Katz*, 533 U.S. 194 (2001), should be overruled.

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BRIEF OF RESPONDENT

Petitioners are police officers who entered Respondent's home without a warrant and in the absence of exigent circumstances. Petitioners contend that Respondent effectively consented to the police entry by inviting a confidential informant to enter the home. This "consent-once-removed" theory is contrary to the Court's precedents limiting warrantless entry into the home and defining the scope of consent searches. The theory also violates the widely shared social understanding that inviting a single person to enter one's home does not constitute consent for others to enter.

Petitioners do not seriously contend that Respondent actually consented to the officers' entry into his home. Instead, they offer a hodgepodge of invalid arguments in support of their warrantless entry. Petitioners' argument that Respondent had no reasonable expectation of privacy inside his home goes much too far, and would effectively eliminate the need for a warrant when a confidential informant observes contraband in a suspect's home. Nor was Petitioners' entry incident to a lawful arrest. Absent exigent circumstances (which concededly did not exist here), police must obtain a warrant before entering a home to make an arrest.

Mr. Callahan's right to be free from Petitioners' search was clearly established at the time of the Petitioners' entry. Although one court of appeals had approved police officers' warrantless entry into a home based upon an informant's consensual entry, that view was not adopted by this Court or the circuit in which this case arose, and

numerous other courts had held warrantless entries unconstitutional in similar circumstances. Under our federal system, courts of appeals independently decide questions of law, including whether a given right is clearly established. To hold otherwise would give the first court of appeals presented with a novel theory like "consent once removed" the power to confer nationwide immunity to law enforcement officers who violate constitutional rights.

STATEMENT

On March 19, 2002, Petitioners, members of the Central Utah Narcotics Task Force, engaged a confidential informant in a plan to raid Respondent Afton Callahan's home on suspicion of dealing methamphetamine. Pet. App. 2. The informant agreed to help the Task Force after being charged with possession of methamphetamine. J.A. 112. Mr. Callahan resided in Fillmore, Utah, a small city approximately 150 miles south of Salt Lake City. Mr. Callahan's home was located approximately 2.2 miles from the courthouse and the Millard County Sheriff's Department. *See* J.A. 60.

The informant's first contact with police on the day of the raid was at approximately 11:00 a.m. J.A. 49-50, 114. The informant told Petitioner Jeffrey Whatcott that he had agreed to purchase methamphetamine from Mr. Callahan later in the day. Whatcott instructed the informant to confirm

that Mr. Callahan had methamphetamine and then contact the police again.[1] Pet. Br. 5-6.

Between approximately 5:30 p.m. and 8:00 p.m., the informant split a 12-pack of beer with a friend, drinking "six to eight" of the beers himself. J.A. 143-44. The informant and his friend went to Mr. Callahan's residence at approximately 8:30 p.m. and allegedly confirmed that Mr. Callahan had methamphetamine to sell. J.A. 115-17. The informant admitted that he "tasted" or "used" methamphetamine during that visit. J.A. 145, 147-48. The informant left the residence and contacted Petitioners, informing them that he "had a deal going down" and that he "needed them to come over and set it up."[2] J.A. 118.

At around 9:00 p.m., the informant met with Petitioners at the sheriff's office in Fillmore. J.A. 53. He told the officers he had been drinking but did not mention his drug use. Pet. App. 3. Petitioners spent the next two hours with the informant preparing to execute the raid on Mr. Callahan's home. Pet. Br. 7; J.A. 121. The officers made the informant drink

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[1] Because this case arises from a grant of summary judgment in Petitioners' favor, the Court must view the facts in the light most favorable to Mr. Callahan. Although Petitioners acknowledge that this standard applies (Pet. Br. 5 n.2), their Statement of Facts nevertheless improperly asserts the truth of Petitioners' version of the events. *See, e.g., id.* & accompanying text.

[2] Petitioners' description of the informant's first visit to Mr. Callahan's home (Pet. Br. 6-7), does not describe the facts in the light most favorable to Mr. Callahan. Mr. Callahan testified that he did not sell the informant methamphetamine, although two other individuals may have done so. *See* J.A. 379-81.

"five, or six, seven, eight cups of coffee" because he was intoxicated. J.A. 119. They equipped him with a wire so that the officers could monitor the events inside Mr. Callahan's home. J.A. 120. The officers also gave him a hundred-dollar bill that they had photocopied to make the planned purchase. J.A. 121. The informant told the officers that he would "play the drums to give them a key to come in." J.A. 120. During the two hours of preparation, Petitioners did not seek to obtain a warrant to search Mr. Callahan's residence. J.A. 89, 258.

At approximately 11:00 p.m., Petitioners drove the informant the two miles from the sheriff's office to Mr. Callahan's residence and dropped the informant off within walking distance. The informant entered the residence while Officer Whatcott monitored the transmission from the informant's wire and the other officers waited for Whatcott's signal to enter. J.A. 188.

The transmission from the informant's wire was not clear. J.A. 332. Officer Whatcott testified that it "sounded like two or three individuals in the house," but that he "could not distinguish who was who." J.A. 64. There was "either a stereo or TV playing," which the equipment "pick[s] up . . . real well," but he "could hear conversation in between." *Id.* He heard conversation about "the purchase price of a C-note, which is slang for a 100-dollar bill," and other conversation that he could not recall or "couldn't distinguish." *Id.* Eventually, he heard the informant say "that he would like to play the drums that were on the porch." J.A. 64-65. Upon hearing this statement, Whatcott "advised the other officers the deal had been made and they could enter the

residence." *Id.* There was no indication that anyone was in danger, that evidence was about to be destroyed, or that Mr. Callahan was aware of police surveillance.

The officers immediately entered Mr. Callahan's home and ordered the informant, Mr. Callahan, and another individual to the floor. J.A. 190-91, 266. One officer testified that he saw Mr. Callahan "drop something" that he said looked like a bag of methamphetamine that the officers later discovered. J.A. 266-67. Upon searching Mr. Callahan, the officers discovered the hundred-dollar bill they had given to the informant. J.A. 244-45. Mr. Callahan consented to a subsequent search of his home, during which the officers discovered syringes. J.A. 196.

The State Court Proceedings. Mr. Callahan was charged with possession and distribution of methamphetamine. At trial, Officer Jenkins agreed that the officers had "some basis to get a search warrant" before going to Mr. Callahan's house because the informant "had seen the baggies of methamphetamine." J.A. 217. Officer Jenkins also testified that he believed the "legal basis" to enter Mr. Callahan's home was "to secure the persons in the residence at that time. Because we had just purchased methamphetamine, we knew that there was a large quantity of methamphetamine, and we can secure that residence with those people, and either obtain a search warrant from that point or from permission to search." J.A. 216. Officer Pearson testified that he considered getting a warrant, but that the officers "did not have enough time to do it." J.A. 245-46. Officer Pearson also

testified that he believed exigent circumstances justified the entry. J.A. 257. Officer Whatcott testified that there was no attempt to get a search warrant. J.A. 89. None of the officers asserted that their entry was justified by consent or "consent once removed."

Mr. Callahan objected to the introduction of the evidence found inside his home on the ground that the officers' entry and search violated the Fourth Amendment. *See* J.A. 295-297. The prosecutor argued that the officers' entry was justified by exigent circumstances because there was "credible evidence that there [were] controlled substances in the house," that there was "an actual distribution," and "there was more in the house being held for distribution." J.A. 299-300. In response, Mr. Callahan's attorney noted that the first contact with the informant was 12 hours before the entry to Mr. Callahan's home, that the officers were with the informant for two hours after he had observed the methamphetamine, that there are magistrates available in Fillmore, and that a telephone search warrant was also available. J.A. 300.

The court held that the officers had probable cause to make an arrest for distribution because "a felony was committed within their presence" through hearing the informant's signal, and that the entry to the home was proper because there were exigent circumstances. J.A. 301-302. Mr. Callahan then entered into a plea agreement under which he

reserved the right to appeal the denial of his suppression motion.[3]

On appeal, the State conceded "that the trial court erred in finding that the entry was justified by exigent circumstances." J.A. 334. The Utah Court of Appeals agreed that the "Task Force entry was not justified under the doctrine of exigent circumstances." *Id.* n.2. The court stated that "the presence of narcotics, or the possibility of additional drug sales" did not justify finding exigent circumstances where there was "no threat to person or evidence, and nothing in the record suggests that Callahan knew or had reason to suspect, that he was being monitored" by police. *Id.*

The appellate court rejected the State's alternative argument that "Task Force officers inevitably would have discovered the evidence found in the [informant's] pocket." J.A. 335. The court observed that "the argument that if we hadn't done it wrong, we would have done it right, is far from compelling." J.A. 337 (internal quotation marks omitted). Because the Task Force adopted "a plan that included an illegal entry from the outset," the court concluded that no "independent legal avenue for discovery was ever available." J.A. 338 (internal quotation marks and emphasis omitted).

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[3] Utah permits such conditional pleas. *See* Utah R. Crim. P. 11(j); *Utah* v. *Sery*, 758 P.2d 935, 937-38 (Utah Ct. App. 1988). "A defendant who prevails on appeal shall be allowed to withdraw the plea." Utah R. Crim P. 11(j). Mr. Callahan withdrew his plea following his successful appeal, and the matter was dismissed.

The District Court's Judgment. Mr. Callahan then brought this suit for damages under 42 U.S.C. § 1983, alleging that Petitioners' warrantless entry and search of his home violated his rights under the Fourth and Fourteenth Amendments. Pet. App. 4-5. On cross-motions for summary judgment, Petitioners argued that the search was justified by the "consent-once-removed" theory and three additional grounds. Pet. App. 40.

The district court observed that Petitioners' "strongest argument appears to be the doctrine of 'consent-once-removed.'" *Id.* at 47. According to the court, the doctrine applies if an "'undercover agent or informant (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search and (3) immediately summoned help from other officers.'" *Id.* at 47-48 (quoting *United States* v. *Pollard*, 215 F.3d 643, 648 (6th Cir. 2000)).

The court "wonder[ed] about the grounding of this doctrine," commenting that "[i]t seems a bit of a stretch to call the kind of police entry that occurred here 'consensual.'" *Id.* at 52. The court assumed that Petitioners violated the Fourth Amendment, but held they were entitled to qualified immunity because in light of authority from other circuits, the illegality of the consent-once-removed theory was not clearly established. *Id.* at 55.

The Court Of Appeals' Opinion. Mr. Callahan appealed the district court's judgment to the Tenth Circuit, which reversed. Pet. App. 1-18. In their brief to the Tenth Circuit, Petitioners relied solely on the consent-once-removed theory.

Petitioners argued that the court of appeals "should adopt the consent once removed doctrine;" and if it did not, that they were "entitled to qualified immunity because any right violated was not clearly established." Appellee's Br. at 14, 16. They did not assert that exigent circumstances or any other basis existed for affirming the district court's decision. *See id.* at 7-19; Pet. App. 10-11, 17.

The Tenth Circuit held that Petitioners violated Respondent's Fourth Amendment rights. Pet. App. 8-18. The court noted that "[c]ourts continually have viewed the warrantless entry into a house as presumptively unreasonable" because "'the home is entitled to the greatest Fourth Amendment protection.'" *Id.* at 8 (quoting *United States* v. *Najar*, 451 F.3d 710, 712-13 (10th Cir. 2006)). The presumption of unreasonableness can be overcome only when the entry falls within one of a few "'carefully defined exceptions based on the presence of "exigent circumstances."'" Pet. App. 9 (quoting *United States* v. *Walker*, 474 F.3d 1249, 1252 (10th Cir. 2007)).

The court stated that its precedent would support holding that the Fourth Amendment permits officers' warrantless entry to assist an *undercover officer* who has been previously admitted, but found "the distinctions between an officer and an informant to be significant." *Id.* at 11. The court concluded that by "entering Mr. Callahan's home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances, [Petitioners] violated Mr. Callahan's constitutional rights under the Fourth Amendment." *Id.* at 14.

The court of appeals further held that the Fourth Amendment right violated by Petitioners was clearly established. *Id.* at 14-15. The court quoted this Court's statement that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Id.* at 15-16 (quoting *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004)). Officers who seek "to craft a new exception" to "that fundamental tenet" "cannot reasonably have relied on an expectation that [the Court] would do so." *Id.* at 109 (quoting *Groh*, 540 U.S. at 564). The court also held that under Tenth Circuit precedent, "warrantless entries into a home are *per se* unreasonable unless they satisfy the established exceptions." *Id.* at 16. The officers could not come within the consent exception because "a mere transient guest, without a 'substantial interest in or common authority over the property,' cannot consent to the entry of others." *Id.* (quoting *United States* v. *Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985)).

The court acknowledged that the Seventh Circuit had held differently, but stated, "The precedent of one circuit cannot rebut that the 'clearly established weight of authority' is as the Tenth Circuit and the Supreme Court have addressed it." Pet. App. 17. Because "the officers knew (1) they had no warrant; (2) Mr. Callahan had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them, . . . 'reasonable officers could not have believed that' their warrantless entry" was

lawful. *Id.* (quoting *Wilson* v. *Lane*, 526 U.S. 603, 615 (1999)).

The Tenth Circuit denied rehearing en banc. Pet. App. 60. In its order granting certiorari, this Court directed the parties to brief and argue the additional question, "Whether the Court's decision in *Saucier* v. *Katz*, 533 U.S. 194 (2001) should be overruled." J.A. 395.

SUMMARY OF THE ARGUMENT

1. Petitioners violated the Fourth Amendment by entering Mr. Callahan's home without a warrant. Physical entry into the home is the "chief evil" against which the Fourth Amendment is directed. A warrantless home entry is presumptively unreasonable unless it falls into one of the carefully drawn and jealously guarded exceptions to the warrant requirement. This Court has approved warrantless entry into the home only when supported by consent or exigent circumstances, neither of which was present here.

a. The consent exception does not support Petitioners' entry. In applying the consent exception, courts look to "widely shared social expectations." It is widely understood that an invitation to enter one's home extends only to the person invited, and not to others who may be lurking outside. A reasonable person would understand that an invitation to enter a private home is limited to the person who receives the invitation.

b. Petitioners do not seriously argue that Mr. Callahan consented to their entry into his home. Instead, they argue that, by consenting to an informant's entry, Mr. Callahan waived his

expectation that others would not enter without his consent. This Court has held that an informant may reveal *information* to the police that was revealed to the informant inside a home, but the Court has never approved a warrantless home entry based simply on an informant's prior entry. Similarly, this Court's cases allowing the police to recreate a "private search" in limited circumstances have never been applied to permit a warrantless home entry.

If adopted, Petitioners' arguments would justify warrantless police entry into the home whenever an individual has been invited inside, because anything the invitee sees would no longer be subject to an expectation of privacy, and the police would simply be "recreating" a private search by the invitee.

c. Petitioners' argument that the search is justified as incident to their arrest of Mr. Callahan is unpersuasive. A search incident to arrest is justified by the exigencies inherent in the arrest procedure. None of those exigencies exist when a confidential informant inside the premises signals to officers outside that an illegal transaction has occurred. When the suspect is unaware of police presence, there is no concern that evidence will be destroyed, the suspect will flee, or for officer safety.

Moreover, an arrest is a Fourth Amendment seizure, and in order to be seized an individual must reasonably believe that he is not free to leave. When a person is unaware of any police presence or signal, he cannot reasonably believe he is not free to leave and therefore is not seized within the meaning of the Fourth Amendment.

When an undercover officer, rather than an informant, is invited into a home, the entry does not require the police to use the coercive power of the state. When an officer is legally inside the home, other officers may be justified in entering to assist the officer in completing an arrest under an exigent circumstances theory. Petitioners and their amici agree that informants should not attempt to make arrests. Moreover, the authority to make a citizens' arrest is a matter of state law, and the Court has held that the reasonableness of a search under the Fourth Amendment should not depend upon state law that varies from state to state.

d. There is no legitimate law enforcement need for a consent-once-removed doctrine. Police officers can readily obtain a warrant or anticipatory warrant before or after they send a "wired" informant into a home, and can also rely on the exigent circumstances exception in appropriate cases. The only interest furthered by the consent-once-removed procedure is expediency, which the Court repeatedly has held to be inadequate in home invasion cases.

2. Petitioners are not entitled to qualified immunity. Their conduct violated the clearly established law of this Court and the Tenth Circuit, under which a warrantless police entry to the home, even when police have probable cause to make an arrest, has long been held *per se* unreasonable unless it is supported by consent or exigent circumstances.

Petitioners mischaracterize the state of the law at the time of the raid. They assert that three federal circuits and two state supreme courts had approved the consent-once-removed theory, but most of these cases involved consensual entry by

undercover police officers. Only one circuit had extended the theory to a case like this one, involving an informant. On the other side of the ledger, one of the state supreme courts expressly *rejected* consent once removed as a general principle, and at least three federal circuits and one state supreme court had held that warrantless police entry following an informant's entry and signal to police violates the Fourth Amendment. When courts have approved such entries, it has generally been based on exigent circumstances, which concededly were not present here.

Decisions by a single out-of-circuit court cannot provide officers with a safe harbor from liability under § 1983. The decisions of this Court and the Tenth Circuit, as well as the great weight of authority from other courts, show that the right to be free from the warrantless search conducted by Petitioners was clearly established.

3. Because the constitutional issue in this case is relatively straightforward, the Court may wish to reconsider whether this is an appropriate case to reexamine *Saucier* v. *Katz*. If the Court reaches the *Saucier* question, it should retain *Saucier*'s mandatory two-step analysis.

Saucier is a recent precedent of this Court, and it has not proved to be unworkable. The reasons that the court adopted the two-step analysis still apply. Answering the constitutional question promotes development of the law. If given the option to avoid answering a constitutional question, experience shows that courts will avail themselves of that option in a significant number of cases.

The Court should not adopt one rule for Fourth Amendment issues and another for other constitutional issues. Abandoning *Saucier* in Fourth Amendment cases would encourage a post-hoc search for justifications for unconstitutional behavior. Moreover, Fourth Amendment rulings may be better reasoned in the qualified immunity context precisely because they are not burdened by the exclusionary rule. Finally, as the Solicitor General notes, *Saucier*'s two-step analysis serves to maintain analytical clarity in Fourth Amendment cases.

ARGUMENT

I. Petitioners' Warrantless Entry Into Respondent's Home Violated The Fourth Amendment.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This Court has long recognized that "physical entry of the home" is the "chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980). It is therefore a "'basic principle of Fourth Amendment law'" that warrantless entry into the home is "'presumptively unreasonable.'" *Groh*, 540 U.S. at 559 (quoting *Payton*, 445 U.S. at 586). *See also Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (absent an exception, warrantless entry into the home is "unreasonable *per se*"). Exceptions to the principle that warrantless entries into the home are unreasonable are "jealously and carefully drawn." *Randolph*, 547 U.S. at 109; *see also, e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001). "[A]bsent

exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant." *Steagald* v. *United States*, 451 U.S. 204, 214 n.7 (1981).

The presumption against warrantless entry into the home applies "even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Payton*, 445 U.S. at 587-88. Similarly, police officers must obtain a warrant to arrest an individual in the home, even if they have probable cause for the arrest. *Payton*, 445 U.S. at 601-02; *Kirk* v. *Louisiana*, 536 U.S. 635 (2002) (per curiam) (warrantless entry, arrest and search based on probable cause to arrest "plainly violates" *Payton*.). The Court has explained that "the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home." *Payton*, 445 U.S. at 576.

Petitioners do not contend that Mr. Callahan expressly consented to their entry into his home, or that exigent circumstances justified the entry. Instead, Petitioners urge the Court to expand the scope of the consent exception (or recognize a new exception) to allow warrantless searches based on a "consent-once-removed" theory. Under this Court's decisions, it is Petitioners' burden to show "'an exceptional situation' as to justify creating a new exception to the warrant requirement." *Mincey* v. *Arizona*, 437 U.S. 385, 391 (1978) (quoting *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970)). Petitioners have not come close to meeting that heavy burden in this case.

A. Consent Does Not Justify A Warrantless Police Entry Following An Invited Informant's Signal.

"The constant element in assessing Fourth Amendment reasonableness in the consent cases" is "the great significance given to widely shared social expectations." *Randolph*, 547 U.S. at 111. The consent-once-removed theory violates widely shared social expectations because it is generally understood that an invitation for one individual to enter a home does not extend to other individuals.

"When the police are relying upon consent as the basis for their warrantless search, they have no more authority than they have apparently been given by the consent." 4 LaFave, Search & Seizure § 8.1(c) at 19 (4th ed. 2004); *see also United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 666-667 (5th Cir. 2003) (quoting LaFave). "It is thus important to take account of any express or implied limitations or qualifications attending that consent which establish the permissible scope of the search in terms of such matters as time, duration, area, or intensity." *Id.*; *United States* v. *Pikyavit*, 527 F.3d 1126, 1131 (10th Cir. 2008) (quoting LaFave); *United States* v. *Iribe*, 11 F.3d 1553 (10th Cir. 1993) (consent to search house did not extend to detached padlocked garage).

Here, the scope of Mr. Callahan's consent is limited by the ordinary social expectation that a person who invites an individual into his home does not expect the invitation to extend to anyone but the person invited. The Court has long looked to such ordinary social expectations to determine the reasonableness of one's expectation to privacy. *See, e.g.*, *Randolph*, 547 U.S. at 111; *Minnesota* v. *Olson*,

495 U.S. 91, 98 (1990) (noting "the everyday expectations of privacy that we all share"). Because Mr. Callahan consented only to the entry of the confidential informant, his consent did not give the Petitioners authority to enter.[4]

The social expectations are the same when viewed from the perspective of the uninvited person. No reasonable person would enter another's home simply because a friend, co-worker, or other acquaintance had been admitted. *Cf. Randolph*, 547 U.S. at 113 ("no sensible person would go inside" at one occupant's invitation "when a fellow tenant stood there saying, 'stay out.'"). Thus, a police officer working with a confidential informant who is admitted consensually has "no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." *Id.* at 114.

Indeed, Petitioners expressly concede that the informant had no authority to permit police to enter. Pet. Br. at 39, 41; *see also United States* v. *Matlock*, 415 U.S. 164 (1974); *United States* v. *Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985). "[N]either state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person

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[4] The expectation that a person may not exceed the scope of consent to enter a premises has long been reflected in the law of property. *See* Thomas W. Waterman, A Treatise on the Law of Trespass in the Twofold Aspect of the Wrong and the Remedy §§492-94, 790 (1875) (When a person enters property based on lawful process or consent, but subsequently exceeds the scope of his authority, he is liable for trespass.).

occupying the premises." *Randolph*, 547 U.S. at 112. Accordingly, consent to the entry of an informant cannot reasonably be construed as consent to the entry of additional police officers who were not invited to enter.

The scope of consent is judged from the perspective of "'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991). When an informant or an undercover officer is admitted to a residence, a "typical reasonable person" would not understand the invitation to that person would justify the subsequent entry of five additional unknown individuals who were not invited. The expectation is the same whether the invitee is an informant or an undercover police officer.[5]

To hold otherwise would be fundamentally contrary to the Court's recent decision in *Georgia* v. *Randolph*. There, the Court held that police may not enter a home without a warrant with the consent of one occupant but over the objection of another occupant. 547 U.S. at 120. An informant, like the cotenant in *Randolph*, can "deliver evidence to the police" that they may then use to obtain a warrant. *Id.* at 116. Reliance on that "information instead of

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[5] Although *consent* does not justify the subsequent entry of police, for the reasons explained in part I.C below, an exigent-circumstances or search-incident-to-arrest rationale may justify a different result when an undercover officer rather than an informant is inside the house.

disputed consent accords with the law's general partiality toward 'police action taken under a warrant [as against] searches and seizures without one.'" *Id.* at 117 (alteration in original) (quoting *United States* v. *Ventresca*, 380 U.S. 102, 107 (1965)).

B. Inviting A Guest Into The Home Does Not Waive The Occupant's Reasonable Expectations Of Privacy.

Although Petitioners rely on a "consent-once-removed" theory, they do not seriously contend that Respondent actually consented to their entry into his home. Instead, they contend that, by consenting to the informant's entry, Respondent lost any reasonable expectation that he could exclude police officers. Petitioners' argument is contrary to "the everyday expectations of privacy that we all share." *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990).

Visiting the home of another "serves functions recognized as valuable by society." *Id.* We visit the homes of family members, neighbors, co-workers, acquaintances, and friends for a variety of purposes: to socialize, share a meal, watch a sporting event, worship, meet a candidate for public office, celebrate a holiday, commiserate or mourn events large and small, seek or give advice, help another in need, or simply to spend time in the company of our fellows. Some home visits involve a charitable donation, a campaign contribution, a personal loan, or the purchase of goods or services. Those visits are no less valuable to society because they have a financial or commercial aspect. A person who invites another into his home to conduct business or a financial transaction does not surrender the reasonable

expectation that the invitation extends only to those invited.

This result is consistent with ordinary social expectations. Individuals use their homes to engage in commercial activities of many kinds: selling Girl Scout cookies, hosting Tupperware parties, or selling products offered by Amway, Avon, or Mary Kay, to name just a few examples. By engaging in these activities, individuals do not transform their homes into public places that anyone may enter. They retain a reasonable expectation that uninvited individuals will not enter their home. Although selling Tupperware is legal and selling controlled substances is not, the Court has recognized that the Fourth Amendment's protection of the home is not overcome by a showing that illicit activity was occurring inside. *See, e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 114 & n.9 (1984) (collecting cases).

1. The Court's Informant Cases Do Not Support Petitioners' Argument. In support of the assertion that, by inviting a confidential informant into his home, Mr. Callahan "surrendered his usual Fourth Amendment protection in the area of his home that he displayed to" the informant, Pet. Br. 22, Petitioners cite *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966), and Justice White's plurality opinion in *United States* v. *White*, 401 U.S. 745 (1971). Pet. Br. 21. Neither case stands for that proposition or anything close to it.

In *Hoffa*, the Court held that the Fourth Amendment does not protect an individual's "misplaced confidence that [an informant] would not reveal his wrongdoing." 385 U.S. at 302. In *White*, Justice White opined that "one contemplating illegal

activities must realize and risk that his companions may be reporting to the police." 401 U.S. at 752. The proposition that an informant may "reveal" or "report" information to the police is quite different from the proposition that admitting one person into a home destroys the occupant's expectation that he may refuse to admit others.

Both *Hoffa* and *White* involved the use at trial of information gathered by the confidential informant; neither case involved entry to a home. *Id.* at 746-47 (recorded information from wired informant); *Hoffa*, 385 U.S. at 296 (informant's testimony of defendant's incriminating statements). *Hoffa* and *White* would support the admission of the informant's testimony and Petitioners' recording of the events inside Mr. Callahan's home, but they do not justify Petitioners' warrantless entry. The risk that the informant would "expose what he observed to the police," Pet. Br. 22, did not reasonably include the risk that the informant would summon officers to enter Mr. Callahan's home. Petitioners themselves expressly concede that the informant was *not* authorized to admit the officers to the residence. *Id.* at 39, 41.

Petitioners also cite *Lewis* v. *United States*, 385 U.S. 206 (1966), but that case is also readily distinguishable. *Lewis* involved the use at trial of narcotics purchased by an undercover officer from the defendant in the defendant's home. *Id.* at 207-08. the Court held that the Fourth Amendment does not prohibit an undercover officer from obtaining entry to a suspect's home "by misrepresenting his identity and stating his willingness to purchase narcotics." *Id.* at 206-07. The Court held that "the

deceptions of the agent" were not unconstitutional because to hold otherwise "would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*." *Id.* at 210. The Court explained that the undercover officer's misrepresentation did not become unconstitutional merely because it occurred inside a home: "[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, *that business* is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Id.* at 211 (emphasis added).

Lewis did not adopt a rule that selling narcotics from a home destroys the occupant's interest in privacy of the home. To the contrary, the Court stated that when the defendant conducts an illegal business out of his home, "[a] government agent, in the same manner as a private person, *may accept an invitation* to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Id.* (emphasis added). *Lewis* thus stands for the proposition that the Fourth Amendment does not protect a defendant against his own invitation to do business simply because the business is conducted in his home. It does not stand for the quite different proposition that admitting a person into a home for a business purpose destroys all expectation of privacy in the home such that police may subsequently enter with impunity. Similarly, Justice Brennan's concurring opinion in *Lewis*, which stated that a person can "waive the right to privacy . . . to the extent that he opens his home to the transaction of business and

invites anyone willing to enter to come in to trade with him," *id.* at 213, recognized that a waiver occurs only "to the extent" the home is open to all comers. In *Lewis*, as in this case, the business was not open to all comers, but instead required "an invitation" to enter. *Id.* at 211. Mr. Callahan's invitation extended only to the informant; not to the police officers outside the house.

2. Petitioners' Entry Is Not Justified As Recreating A Private Search. Petitioners' argument (Pet. Br. 26-28) that their entry recreated a "private search" conducted by the informant is untenable. While the Court has held that police may seize and open a package that was previously opened by employees of a private carrier where "it was apparent" that the package "contained contraband and little else," *Jacobsen*, 466 U.S. at 121-22, the Court has never applied the "private search" doctrine to allow police to enter a home without a warrant on the theory that someone else has already seen what's inside. Accepting that proposition would, among other things, effectively overrule this Court's decision in *Randolph*. Under Petitioners' theory, in *Randolph* there would have been no expectation of privacy preventing the police from following one occupant of a premises inside (with her consent) to view contraband over the objection of another occupant because they would simply have been "recreating" the occupant's "private search."

C. "Consent Once Removed" Cannot Be Justified As A Search Incident To Arrest.

1. A Warrantless Home Entry Is Not Justified By Police Officers' Intent To Arrest The Suspect Once Inside. In order to arrest a suspect inside a residence, police must first have a legal basis to be inside. Petitioners' entry into Mr. Callahan's home cannot be justified as incident to the arrest they intended to make once they entered. The reasonableness of a "search incident to arrest" depends on the exigencies inherent in the arrest procedure. During the course of a lawful arrest, "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons." *Chimel* v. *California*, 395 U.S. 752, 762-63 (1969). It is also reasonable "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. The arresting officer may also search "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id.* Thus, to protect the arresting officers' safety and prevent the destruction of evidence, an arrest permits officers to search the individual and the area "'within his immediate control.'" *Id.* Similarly, police may perform a "protective sweep" of the premises for officer safety if the officer has reason to believe "that the area swept harbored an individual posing a danger to the officer or others." *Maryland* v. *Buie*, 494 U.S. 325, 327 (1990).

The exigencies of the arrest procedure are not present when a confidential informant *inside* a home signals to officers *outside* the home that a drug deal

has been completed. Most fundamentally, the suspect is unaware that he is about to be arrested, so the concern that "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest," and "the possibility that an arrested person will attempt to escape" are not present. *Washington* v. *Chrisman*, 455 U.S. 1, 7 (1982). A suspect likewise has no reason to seek out a weapon or destroy evidence. Nor is there any concern for officer safety. Police outside the home have nothing to fear from a suspect inside the home who is unaware of their presence. The rationale for the "incident to arrest" exception therefore does not justify the warrantless entry of police officers into a suspect's home after receiving the confidential informant's signal.

Furthermore, police officers are not permitted to rely on exigent circumstances where, as here, the officers plan the arrest in advance. "[E]xigent circumstances justifying warrantless entry should be determined 'by distinguishing the truly "planned" arrest from the arrest which is made in the course of an ongoing investigation in the field.'" *Alexander* v. *San Francisco*, 29 F.3d 1355, 1375 (9th Cir. 1994) (quoting 2 LaFave, Search & Seizure, § 6.1(f) at 600-02 (2d ed. 1987)); 3 LaFave § 6.1(f) at 318-319 (4th ed.). When police officers with probable cause plan a warrantless arrest in advance, "whatever exigencies [that] thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained." 3 LaFave § 6.1(f) at 319.

Petitioners are wrong to suggest that they entered Mr. Callahan's home "to protect the safety of the state actors and to protect the integrity of the

arrests." Pet. Br. 30. Nobody was in danger when the officers heard the informant say he wanted to play the drums on Mr. Callahan's porch. There was no concern that Mr. Callahan or others in the premises might destroy evidence, and no indication anyone other than the informant knew that Petitioners were waiting outside. Moreover, to the extent the Petitioners now suggest there was some danger or exigent circumstance that justified their entry, they expressly waived that argument in the court of appeals. *See* Pet. App. 10-11, 17; *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").[6]

The Court's decision in *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), does not support Petitioners' argument. In *Rawlings*, unlike in this case, the officers were lawfully inside a residence pursuant to an arrest warrant, and had also obtained a search warrant. *Id.* at 100-01. The defendant admitted ownership of a "sizeable quantity of drugs" after police gave him *Miranda* warnings. *Id.* at 101, 111. In those circumstances, the Court held that a search of the defendant's person immediately preceding his arrest was justified as incident to that arrest. *Id.* at 111. *Rawlings* recognizes that a search incident to arrest need not always be conducted after the formal arrest. It does not authorize police officers to enter a residence to make a warrantless arrest.[7] *See also*

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[6] In the court of appeals Petitioners made no argument based on the search-incident-to-arrest doctrine.

[7] Petitioners' assertion that allowing warrantless home entry as incident to the arrest inside the home will result in *less* invasive (...continued)

Johnson v. *United States*, 333 U.S. 10 (1948) (warrantless hotel room entry and search not justified as incident to arrest of person found inside).

2. A Confidential Informant's Signal Does Not Commence An Arrest. Petitioners attempt to force this case into the "incident to arrest" category by asserting that the informant "put the arrest in motion." Pet. Br. 29. Petitioners contend that the informant's signal commenced their arrest of Mr. Callahan, and their entry was justified to maintain control of the arrest and to ensure their safety and the informant's safety. *Id.* at 29-32.

This argument is fatally flawed because while there can be a Fourth Amendment seizure without an arrest, *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968), there can be no arrest without a seizure. At the time of the informant's signal, Mr. Callahan was not seized.

"[A]n arrest is a Fourth Amendment seizure." 3 LaFave § 5.1(a), at 5; *see also, e.g.*, *United States* v. *Cooper*, 43 F.3d 140, 146 (5th Cir. 1995) ("[A]rrest [is] plainly a Fourth Amendment 'seizure.'"). A person is "'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446

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searches is detached from reality. Pet. Br. 32-34. Petitioners argue that a search pursuant to a warrant would be more intrusive, but it is unrealistic to expect that police arresting an individual for dealing narcotics would not thereafter seek a warrant (or consent) to search the home for contraband. A police officer who failed to do so would be derelict in his duty.

U.S. 544, 554-55 (1980) (opinion of Stewart, J.); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984) (same); *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (same).

Here, Mr. Callahan was not "seized" by the informant's statement that he wanted to play the drums. A reasonable person in Mr. Callahan's circumstances would have no idea that there even was a police presence, and would have no reason to believe that he was not free to leave. Neither Petitioners nor the informant claimed at trial that the informant's actions were part of the arrest. To the contrary, police "arrested" the informant along with Mr. Callahan. J.A. 31. Mr. Callahan was not "seized" within the meaning of the Fourth Amendment by any action of the informant.

Petitioners' reliance on *Washington* v. *Chrisman* is thus misplaced. In *Chrisman*, "the officer had placed [the suspect] under lawful arrest, and therefore was authorized to accompany him to his room for the purpose of obtaining identification." 455 U.S. at 6. Here there was no seizure. Mr. Callahan cannot reasonably be said to have been under arrest, and Petitioners were not permitted to enter his premises on the theory that they were protecting the safety of the arrest.

3. Confidential Informants Are Not Equivalent To Police Officers. Courts may reach a different result when an undercover police officer, rather than an informant, enters a home with the occupant's consent. The primary difference between the two types of cases is that in one situation the police are all *outside* the home, while in the other a police officer is properly *inside* the home. In the latter situation, the officer is in a place he is legally

entitled to be when probable cause is established, and therefore is permitted to arrest the suspect without a warrant.

Petitioners argue that the informant was an "agent of the state" and that there is no relevant distinction between police officers and informants. Pet. Br. 35-39. But there are important differences between officers and informants. Unlike informants, the "law enforcement officer [is] 'engaged in the often competitive enterprise of ferreting out crime.'" *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 667 (1989) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)). The warrant requirement serves "to interpose a neutral magistrate between the citizen and the *law enforcement officer*." *Id.* When a police officer is admitted by consent, the need for the coercive power of the state to intrude upon the suspect's privacy is obviated. The same is not true when a an informant is admitted.[8]

The distinction between police officers and informants is not dissolved by the theoretical possibility of a citizen's arrest. As the court of appeals noted, a citizen's power to arrest "does not grant the citizen all of the powers and obligations of the police as agents of the state." Pet. App. 12 (collecting cases). Moreover, as Petitioners acknowledge, the power of citizens to effect an arrest is a matter of state law. Pet. Br. 36-37. State law

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[8] Although Petitioners assert (Pet. Br. 38-39) that a distinction between officers and informants would lead to difficult line drawing problems, it is not difficult to distinguish police officers from informants.

concerning whether, and in what circumstances, a citizen may make an arrest varies considerably. *See, e.g.* N.C. Gen. Stat. §§ 15A-404, -405 (prohibiting citizen's arrest in almost all circumstances); Mont. Code Ann., § 46-6-502 ("existing circumstances" must "require the person's immediate arrest"); *see generally* M. Cherif Bassiouni, Citizen's Arrest: The Law of Arrest, Search, and Seizure for Private Citizens and Private Police 13-14, 17-22 (1977). In analyzing the States' citizen's arrest laws, Professor Bassiouni found it "noteworthy that, while the privilege of a citizen to arrest another varies from state to state, the duty and power of peace officers is generally the same in all states." *Id.* at 20.

Given the variations in state law, the reasonableness of a police entry cannot rely on the power of a private citizen to make an arrest inside the home. As this Court recently noted, the reasonableness of a search "has never 'depend[ed] on the law of the particular State in which the search occurs.'" *Virginia* v. *Moore*, 128 S. Ct. 1598, 1604 (2008) (quoting *California* v. *Greenwood*, 486 U.S. 35, 43 (1988)).

Moreover, Petitioners and the government agree that informants should not attempt to make a citizen's arrest when working with police. Pet. Br. 38; U.S. Br. 17. Police are trained and experienced in conducting such arrests safely, while informants typically are not. If even Petitioners do not think it would be reasonable for the informant to effect the arrest, it follows that a police entry grounded on the theoretical possibility of such an arrest is likewise unreasonable.

D. "Consent Once Removed" Serves No Legitimate Law Enforcement Need.

The "consent once removed" theory serves no legitimate law enforcement need. Police officers using an informant to make a controlled buy inside a home may make use of several reasonable options that do not involve a warrantless entry to the home.

1. "Consent Once Removed" Is Not Necessary Because Police Can Obtain A Warrant Or An Anticipatory Warrant. The purpose of the warrant requirement is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. *Steagald*, 451 U.S. at 212. "[A]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald* v. *United States*, 335 U.S. 451, 455-56 (1948).

When police decide to make a "controlled buy," they frequently have sufficient information to support an application for a search warrant. Police officers expend considerable effort to gather a team to perform the raid, prepare and wire the informant, and make the other preparations necessary for the raid. It takes relatively little additional effort to obtain a warrant before the raid.

In this case, Petitioners first learned that a drug transaction might occur on the day of the raid twelve hours before they entered Mr. Callahan's home. J.A. 49-50. At that point they could have alerted a magistrate that they might need a warrant at some point that evening. Petitioners learned from the informant that he had confirmed that there was methamphetamine for sale 2 1/2 hours before they executed the raid. J.A. 118. Even without having contacted a magistrate earlier, one of the five individuals participating in the raid could have obtained a search warrant or an anticipatory warrant within that period. Indeed, one of the Petitioners admitted that because the informant had seen the methamphetamine, they could have obtained a warrant. J.A. 217. With a warrant or anticipatory warrant in hand, Petitioners could have conducted the raid exactly as they did, executing the warrant after receiving the signal from the informant.

Even if the police failed to get a warrant before sending in the informant, they could have waited until the informant emerged, and then obtained a warrant. As argued by counsel in the trial court, the City of Fillmore has magistrates, and the option of a telephone warrant was also available. J.A. 300. Had Petitioners followed this course, they would still have been permitted by this Court's and the Tenth Circuit's cases to enter without a warrant if any unexpected exigent circumstances had arisen. No such exigency arose here.

Given the ready availability of a warrant, the only interest furthered by allowing a warrantless entry on a confidential informant's signal absent any

exigency is expediency, which this Court has rejected. "A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Randolph*, 547 U.S. at 116 n.5; *see also Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971) (The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency").

2. Petitioners' Arguments Would Authorize Warrantless Searches Beyond The Limits Of The "Consent-Once-Removed" Theory. Petitioners' arguments sweep well beyond the limits of the consent-once-removed theory. If accepted by this Court, they would justify warrantless entry into the home in numerous situations in which it has long been understood that a warrant is required.

Courts that have recognized a consent-once-removed theory have required that an undercover agent or informant must have "(1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search and (3) immediately summoned help from other officers." *E.g.*, *United States* v. *Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995). If Petitioners were correct that a suspect who admits an informant "to engage in an illegal narcotics purchase" thereby "surrender[s] his usual Fourth Amendment protection in the area of his home that he display[s]" to the informant, Pet. Br. 22, there would be no need for the informant to establish the existence of probable cause before the police entered. Police do not need probable cause to view that to which there is no legitimate privacy

right. *See* e.g., *California* v. *Greenwood*, 486 U.S. 35, 41 (1988) (garbage); *New York* v. *Class*, 475 U.S. 106, 114 (1986) (vehicle identification number); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (inspection of pervasively regulated industry). Similarly, if Petitioners were correct that a police entry following a consensual informant entry is akin to recreating a private search, Pet. Br. 26-27, the "reenactment" would not require that the informant establish probable cause before the police entered.

Moreover, neither argument justifies the requirement that the informant "immediately" summon additional police officers after establishing probable cause. To the contrary, under Petitioners' theory, the suspect loses his expectation of privacy in every area in which the informant is permitted to enter and in everything that the informant views.

More generally, Petitioners contend that the officers' entry in this case was not a search within the meaning of the Fourth Amendment because Mr. Callahan had no reasonable expectation of privacy in the areas of his home that the informant viewed after his consensual entry. Under that view, inviting another into one's home waives the interest of privacy in every area the invitee goes and in everything he sees. An invitation would thereby reduce the expectation of privacy inside the home to that of garbage set out on the street. *Cf. Greenwood*, 486 U.S. at 41.

Petitioners' "private search" rationale leads to the same result. Under that rationale, letting anyone into a home necessarily lets everyone into the home. Even limiting Petitioners' arguments to the "home business" setting would upset the

expectations of great numbers of individuals who engage in some form of business or commercial activity from their homes.

Adopting Petitioners' arguments would "create a significant potential for abuse." *Steagald*, 451 U.S. at 215. Well-meaning officers, "armed with" consent-once-removed, could justify warrantless home entries based on prior informant entries without the neutral decision of a magistrate that probable cause is present, or could use consent-once-removed "as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Id.* Under Petitioners' view, information from an informant that would justify a magistrate to issue a warrant would now give reason to enter without a warrant.

II. Petitioners Are Not Entitled To Qualified Immunity.

The qualified immunity doctrine protects officials performing discretionary functions from liability for civil damages so long as the official's actions do not violate clearly established rights at the time of the act. *See Anderson* v. *Creighton*, 483 U.S. 635 (1987); *Dixon* v. *Richer*, 922 F.2d 1456 (10th Cir. 1991). The "threshold question" in resolving a claim of qualified immunity is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Scott* v. *Harris*, 127 S. Ct. 1769, 1774 (2007) (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)). For the reasons set forth in Part I of this brief, Petitioners' conduct violated Fourth Amendment rights.

Where a constitutional violation is shown, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Scott*, 127 S. Ct. at 1774 (quoting *Saucier*, 533 U.S. at 201). In deciding whether officers have violated clearly established rights, the Court looks to "the 'objective legal reasonableness'" of the defendants' action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-19 (1982) (citation omitted)). "Whether an asserted federal right was clearly established at a particular time" for qualified immunity purposes "presents a question of law." *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994).

Under the Tenth Circuit's precedent, a § 1983 plaintiff need not engage in "a scavenger hunt for prior cases with precisely the same facts." *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). "[T]he more relevant inquiry" is "whether the law put officials on fair notice that the described conduct was unconstitutional." *Id.* "[Q]ualified immunity will not be granted if government defendants fail to make 'reasonable applications of the prevailing law to their own circumstances.'" *Id.* (quoting *Currier* v. *Doran*, 242 F.3d 905, 923 (10th Cir. 2001)). To determine whether the law is clearly established, the Tenth Circuit looks to this Court's and its own decisions, and also considers whether "'the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'" *Cortez* v. *McCauley*, 478 F.3d 1108, 1114-1115 (10th Cir. 2007) (quoting *Medina* v. *Denver*, 960 F.2d 1493,

1498 (10th Cir. 1992)); *see also Murrell* v. *Sch. Dist. No. 1*, 186 F.3d 1238, 1251 (10th Cir. 1999).

A. Petitioners' Qualified Immunity Claim Rests On A Mischaracterization Of The Law.

In arguing for qualified immunity, Petitioners seriously mischaracterize the state of the law at the time of their entry into Respondent's home. While Petitioners do not contend that any decision of the Tenth Circuit or this Court justified their warrantless entry, they assert that "three federal circuits and two state supreme courts" had approved the consent-once-removed theory, and that "it appears that every Fourth Amendment decision that considered the lawfulness of follow-up entries in undercover buy investigations had permitted the officers' entries without a warrant." Pet. Br. 42, 44. The first assertion is misleading; the second is false.

At the time of Petitioners' raid, only the Seventh Circuit—not "three federal circuits and two state supreme courts"—had applied the "consent-once-removed" theory to an informant who signaled the existence of probable cause to police outside the premises. *See* Pet. 8-9. The other cases cited by Petitioners all involved undercover police officers who were admitted to the home. *See United States* v. *Pollard*, 215 F.3d 643, 646 (6th Cir. 2000); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996); *New Jersey* v. *Henry*, 627 A.2d 125 (N.J. 1993). While Petitioners assert that it makes no difference whether it is a police officer or an informant who is admitted, this Court's Fourth Amendment cases have often looked to whether the police officer is in a place he is legally entitled to be. *See, e.g.*, *Minnesota*

v. *Dickerson*, 508 U.S. 366, 375 (1993) (whether police are "lawfully in a position from which they view an object"); *Lopez* v. *United States*, 373 U.S. 427, 438-39 (1963) (undercover officer's recording of conversation permitted because he was on the premises "with the [defendant's] assent").

Moreover, in one of the state cases that Petitioners cite, the Wisconsin Supreme Court expressly declined to adopt the "consent-once-removed" doctrine as formulated by the Seventh Circuit. *Wisconsin* v. *Johnson*, 518 N.W.2d 759, 815 n.6 (Wis. 1994). The court specifically limited its holding to "allowing back-up or assistance once an officer lawfully on the scene has established probable cause for immediate arrest or seizure and requests back-up or assistance." *Id.*[9]

Petitioners' additional assertion (Pet. Br. 42) that "every Fourth Amendment decision that considered the lawfulness of follow-up entries in undercover buy investigations had permitted the officers' entries without a warrant" is simply untrue. Courts have repeatedly held that police entries in the circumstances of this case are illegal, with or without expressly discussing whether "consent" justified the entry. Indeed, at least three circuits and one state supreme court had held similar entries were unconstitutional.

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[9] The other state case cited by Petitioners has been described by a leading commentator as an "extreme and highly questionable" application of the consent-once-removed theory. 3 LaFave § 6.1(c) at 291 n.114.

In *United States* v. *Santa*, DEA agents entered an apartment "[w]ithin thirty seconds" of a confidential informant's signal that he had seen heroin after being consensually admitted to the apartment for a heroin deal. 236 F.3d 662, 666 (11th Cir. 2000). The Eleventh Circuit concluded that the entry violated the Fourth Amendment because there were no exigent circumstances and the defendant's subsequent consent was tainted by the illegal entry. *Id.* at 676-78.

Similarly, in *United States* v. *Templeman*, officers immediately rushed a suspect's trailer after receiving a signal that suspect had opened a package of narcotics delivered by a wired informant. 938 F.2d 122, 123 (8th Cir. 1991). The Eighth Circuit held that the entry was illegal because there were no exigent circumstances that would have prevented the officers from obtaining a warrant. *Id.* at 123-24.

In *United States* v. *Beltran*, the First Circuit, in an opinion by then-Chief Judge Breyer, held that police violated the Fourth Amendment when they "immediately entered" an apartment after an informant was invited in, saw cocaine, went outside and alerted the police. 917 F.2d 641, 642 (1st Cir. 1991). In *Beltran*, as here, there were no exigent circumstances and the police had probable cause to obtain a warrant for several hours before the planned sale. *See id.*

In *Carranza* v. *Georgia*, officers made a warrantless entry after hearing a wired informant's signal that a transaction (there for falsified documents) had been completed. 467 S.E.2d 315, 316 (Ga. 1996). The Supreme Court of Georgia held that officers may enter the home without a warrant

only where the entry "is by consent or where there are exigent circumstances." *Id.* at 318. There was no suggestion that the defendant's consent to the informant's entry somehow justified the additional entry of police officers. *See also Hawkins* v. *Indiana*, 626 N.E.2d 436, 438-40 (Ind. 1993) (warrantless entry following wired informant's controlled buy violated Fourth Amendment).

Other courts have explicitly rejected the consent-once-removed theory without calling it by that name: "[B]y allowing the informant into his apartment, defendant did not consent to a police entry." *New York* v. *Soto*, 96 A.D.2d 741, 742 (N.Y. App. Div. 1983); *Youtz* v. *Alabama*, 494 So. 2d 189, 195-98 (Ala. Crim. App. 1986) (same, quoting *Soto*). These and other state courts have held that a warrantless home entry following a consensual informant's entry violates the Fourth Amendment.[10] The *Youtz* court even cited *United States* v. *Janik*, 723 F.2d 537 (7th Cir. 1983) an early Seventh Circuit consent-once-removed case. 494 So. 2d at 194. [11]

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[10] *E.g.*, *Tennessee* v. *Graybeal*, 1995 Tenn. Crim. App. LEXIS 517 (Tenn. Crim. App. June 28, 1995); *Youtz*, 494 So. 2d at 195-98; *Soto*, 96 A.D.2d at 742; *North Carolina* v. *Yananokwiak*, 309 S.E.2d 560 (N.C. Ct. App. 1983); *Ohio* v. *Hurt*, 1981 Ohio App. LEXIS 12981 (Ohio Ct. App. Feb. 9, 1981); *Massachusetts* v. *Perez*, 13 Mass. L. Rep. 196 (Mass. Super. Ct. 2001).

[11] When courts have approved warrantless entries in similar circumstances, they have generally based their rulings on the presence of unexpected or exigent circumstances, not consent. *See United States* v. *Parra*, 2 F.3d 1058, 1064 (10th Cir. 1993) (suspected drug dealer unexpectedly left the hotel room); *United States* v. *Palumbo*, 735 F.2d 1095, 1096-97 (8th Cir. 1984) (defendant was overheard saying he needed to enter room where backup police were hiding); *United States* v. *Williams*, (...continued)

Petitioners are also incorrect in asserting that Professor LaFave's treatise supports the consent-once-removed theory as applied to confidential informants. Pet. Br. 45-46. The treatise states that courts have held that "no warrant is needed where the arrest is made within premises to which an undercover *police officer* gained admittance by indicating his interest in participating therein in criminal activity," but that statement applies to the entry of police officers, not confidential informants. 3 LaFave, § 6.1(c) at 290 & n.114 (emphasis added). A footnote following that passage acknowledges "some authority" for the consent-once-removed theory, mentioning both informants and officers, but the *very next sentence* in the text expressly rejects the premise of the consent-once-removed theory as applied to informants: "But the mere fact that a wired informant is inside the house, so that the police outside are able to hear the offense occurring . . . does not excuse the *Payton* warrant requirement." *Id.* at 290-91 & n. 117.[12]

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633 F.2d 742, 743-44 (8th Cir. 1980) (defendant unexpectedly chose different location for the drug purchase); *Verez* v. *Virginia*, 337 S.E.2d 749, 753 (Va. 1985) (suspect was known to be armed and violent); *Cates* v. *Georgia*, 501 S.E.2d 262, 263-64 (Ga. Ct. App. 1998) (drug dealer unexpectedly raised window blinds and could see officers outside); *California* v. *Valencia*, 191 Cal. App. 3d 1483, 1486-87 (Cal. Ct. App. 1987) (defendant unexpectedly chose different location for the drug purchase). There was no comparable exigency in this case.

[12] Petitioners cite to the 1996 Third Edition of Professor LaFave's treatise, which does not contain this sentence, Pet. Br. 46, though the sentence was included in supplements to the Third Edition and the Fourth Edition. *E.g.*, 3 LaFave, Search & Seizure 2004 Pocket Part 72-73 (2003).

In sum, Petitioners mischaracterize the state of the law by asserting that at the time of the raid the consent-once-removed theory as applied to informants was "a reasonably settled doctrine" and "part of the general backdrop of Fourth Amendment rules." Pet. Br. 45.

B. Petitioners Violated Clearly Established Fourth Amendment Rights.

In entering Respondent's home, Petitioners knowingly crossed the "firm line" that this Court has drawn "at the entrance to the house." *Payton*, 445 U.S. at 590. This Court repeatedly has confirmed that warrantless entry into the home without consent or exigent circumstances is "presumptively unreasonable" and "unreasonable *per se*." *E.g.*, *Groh*, 540 U.S. at 559 (quoting *Payton*, 445 U.S. at 586); *Randolph*, 547 U.S. at 16. This Court's decisions clearly instruct police officers not to enter a home absent a warrant, consent, or exigent circumstances. Indeed, "[l]aw enforcement officers are trained in the academy that there are only three legal ways to enter a person's home: with consent, with a warrant or with exigent circumstances." Brian Batterton, *Consent, Exigent Circumstances, and Warrantless Home Entry*, The Public Agency Training Counsel, http://www.patc.com/weeklyarticles/print/consent, exigent-circumstances,warrantless-home-entry.pdf (2008).

The Tenth Circuit has been equally clear, confirming the "'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable,'" and that "absent consent or exigent

circumstances, police may not enter a citizen's residence without a warrant." *United States* v. *Scroger*, 98 F.3d 1256, 1259 (10th Cir. 1996) (quoting *Payton*, 445 U.S. at 573, 590); *see also, e.g.*, *United States* v. *Wicks*, 995 F.2d 964, 969 (10th Cir. 1993) ("Even with probable cause, absent consent or exigent circumstances police officers may not enter a dwelling to make an arrest."); *United States* v. *Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992) ("[P]olice may enter a home without a warrant only when exigent circumstances are present."). The Tenth Circuit had rejected qualified immunity when officers violated this principle. *E.g.*, *Howard* v. *Dickerson*, 34 F.3d 978, 981-82 (10th Cir. 1994) (warrantless home arrest for misdemeanor). The court had also held that "qualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue unlawful." *Anaya* v. *Crossroads Managed Care Sys.*, 195 F.3d 584, 594 (10th Cir. 1999). Rather, "*the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer.*" *Id.* (quoting *Lawmaster* v. *Ward*, 125 F.3d 1341, 1350 (10th Cir. 1997) (emphasis supplied)).

Petitioners take issue (Pet. Br. 49) with the court of appeals' statement that "the relevant right" in this case "is the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15. But the court's analysis shows that it appropriately defined the contours of the constitutional right at issue. The court explained that under this Court's decisions and its own precedents, "warrantless entries into a home are *per se* unreasonable unless

they satisfy the established exceptions," and that "'absent a warrant or exigent circumstances, police could not enter a home to make an arrest.'" Pet. App. 15 (quoting *Wilson*, 526 U.S. at 610-11). The court then stated the facts that led to its conclusion that Petitioners violated a clearly established right. Petitioners knew that "(1) they had no warrant; (2) Mr. Callahan had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them." Pet. App. 17. Although Petitioners had probable cause to believe that a drug transaction had just occurred, an entry based only on probable cause to arrest "plainly violates" *Payton*. *Kirk*, 536 U.S. at 635-36.

None of Petitioners' arguments for the consent-once-removed theory suffices to meet Petitioners' heavy burden to show "'an exceptional situation' as to justify creating a new exception to the warrant requirement."[13] *Mincey* v. *Arizona*, 437 U.S. 385, 391 (1978) (quoting *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970)). Quite the opposite, Petitioners' theories, if accepted, would upset ordinary expectations and sanction unprecedented invasions of privacy.

It may be clearly established that a police practice is unconstitutional even if *no* court has ever issued a decision to that effect. *Hope* v. *Pelzer*, 536

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[13] Though Petitioners have now retreated from asserting that consent once removed is an "exception" to the warrant requirement, *see* Pet. Br. 50, the Petition in this case used that term in the Question Presented and throughout the brief. *E.g.*, Pet. i, 6, 7, 8, 10, 11, 12.

U.S. 730, 739 (2002). Here, as shown above, numerous courts had held that warrantless entry into the home following an informant's entry and signal is unconstitutional.

Petitioners' qualified immunity argument ultimately reduces to the fact that the Seventh Circuit had approved warrantless entry in similar circumstances. Of course, "the decisions of one circuit are not binding on other circuits." *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981); *see also* 18 Moore's Federal Practice § 134.02[1][c] (3d ed. 2007) (same). Moreover, as this Court has observed, "there is usually a case somewhere that provides comfort for just about any claim." *Wilkie* v. *Robbins*, 127 S.Ct. 2588, 2606 (2007). As the Seventh Circuit itself has recognized, police officers are not entitled to a safe harbor from liability under § 1983 whenever such a case exists: "[W]e do not think that it can be the law of official immunity that one contrary decision at either the federal court of appeals or the state supreme court level (or, for that matter, two or more decisions by the same federal court of appeals or state supreme court) provides an automatic safe harbor." *Burgess* v. *Lowery*, 201 F.3d 942, 946 (7th Cir. 2000) (Posner, J.).

The arguments set out in Part I above demonstrate that the Seventh Circuit's decisions on the "consent-once-removed" theory are not only incorrect but clearly incorrect. The concept of consent, as defined by the decisions of this Court and the Tenth Circuit, cannot be stretched to include "consent-once-removed." Moreover, the decisions of this Court and the Tenth Circuit clearly establish

that warrantless entry into the home, absent consent or exigent circumstances, violates the Fourth Amendment even when police have probable cause to arrest. Accordingly, the Tenth Circuit correctly held that Petitioners' entry violated clearly-established Fourth Amendment rights.

Petitioners' reliance on *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), is thus misplaced. Pet. Br. 51-54. *Mitchell* involved a domestic wiretap for national security, which "Justice Departments of six successive administrations had considered" constitutional at the time of the events in question. 472 U.S. at 534. And "[o]nly three years earlier, this Court had expressly left open the possibility that this view was correct." *Id.* When the Court decided the constitutionality of the procedure, it recognized that the similar wiretaps had long been used "without guidance from the Congress or a definitive decision of this Court." *Id.* (quoting *United States* v. *United States Dist. Court*, 407 U.S. 297, 299 (1972)). Unlike *Mitchell*, where the question was truly open at the time of the wiretap, here the precedents of this Court and the Tenth Circuit had made clear on several occasions that warrantless entry absent consent or exigent circumstances violates the Fourth Amendment even when police have probable cause to arrest the person inside. Those precedents were supported by numerous other courts that had held warrantless entries under like facts unconstitutional.

This is not a case in which police were "expected to predict the future course of constitutional law." *Wilson* v. *Layne*, 526 U.S. 603, 617-618 (1999) (quoting *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978)). This Court has long

established a presumption against warrantless home entry without consent or exigent circumstances. Numerous federal and state courts had held searches under these circumstances unconstitutional, and many others had upheld such searches only on the basis of exigent circumstances. The great weight of authority clearly established that there is no exception to the warrant requirement in these circumstances.

Petitioners do not assert that they actually relied on the Seventh Circuit's decisions (or any decisions) concerning the consent-once-removed theory. Indeed, Petitioners never mentioned the consent-once-removed theory in state court. This Court has said that qualified immunity should be granted where the official "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). As the court of appeals held, "[a]lthough other circuits might disagree, Tenth Circuit law governed the reasonableness of the officer's beliefs in this case." Pet. App. 18. It makes little sense to extend qualified immunity to police officers who knew the relevant legal standard, and did not rely on an invalid precedent that was not adopted by the courts of their own federal district, circuit, or State.

III. *Saucier* v. *Katz* Should Not Be Overruled.

In its order granting certiorari, the Court directed the parties to brief the question "[w]hether the Court's decision in *Saucier* v. *Katz*, 533 U.S. 194

(2001), should be overruled."[14] In Respondent's view, the Court should not overrule its decision in *Saucier*. No matter how the Court resolves that question, it should decide both the Fourth Amendment and qualified immunity questions in this case in Mr. Callahan's favor.

As an initial matter, the Court may wish to reconsider whether this is an appropriate case for reconsidering *Saucier*. In *Scott* v. *Harris*, the Court concluded: "We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is . . . easily decided." 127 S. Ct. 1769, 1774 n.4 (2007). Here, the constitutional question is relatively straightforward and is ripe for decision by this Court.

Reconsidering *Saucier* would not change the outcome of this case. The court of appeals (unlike the district court) adhered to this Court's directive in *Saucier* by deciding the constitutionality of the Petitioners' warrantless entry before deciding the qualified immunity question. *See* Pet. App. 8-18. Because the court of appeals has decided both the threshold constitutional issue and the qualified immunity issue, a decision by this Court overruling or modifying the *Saucier* framework will not change the outcome of this case.

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[14] Respondent, like Petitioners and their amici, assumes that the Court intended the parties to address whether *Saucier*'s mandatory two-step qualified immunity inquiry should be retained.

Moreover, the Fourth Amendment issue merits this Court's attention. There is a split of authority on the "consent once removed" theory between the Tenth Circuit on the one hand and the Sixth and Seventh Circuits on the other. *See United States* v. *Paul*, 808 F.2d 645, 648 (7th Cir. 1986); *United States* v. *Yoon*, 398 F.3d 802, 806-08 (6th Cir. 2005). Declining to resolve the Fourth Amendment question on which this Court granted review would leave unresolved a disagreement among the circuits on a significant Fourth Amendment issue.

Overturning or modifying *Saucier*, so that lower courts could avoid constitutional questions by moving directly to the question of whether the asserted right is "clearly established," would have some advantages. It would save judicial resources and avoid potential error when the immunity issue is particularly clear or the constitutional question is particularly complex. *See, e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring); *see also* Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1545–46 (2007). But those advantages cannot be gained in this case. The Tenth Circuit has already decided both the Fourth Amendment question and the qualified immunity question, and both those questions are relatively straightforward and ripe for this Court's review.

1. The Reasons The Court Articulated For The *Saucier* Rule Still Apply. In *Siegert* v. *Gilley*, the Court stated that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of

whether the plaintiff has asserted a violation of a constitutional right at all." 500 U.S. 226, 232 (1991). Deciding this question "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Id.*

In the wake of *Siegert*, lower courts disagreed as to whether the Court's decision required the constitutional question be answered first. *See* Paul Hughes, *Not A Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. Colo. L. Rev. ___ (forthcoming 2009), draft at 10-13 & nn.39-56, available at http://ssrn.com/abstract=1202194 (collecting cases). In 1998, the Court stated that "the better approach" is "to determine first whether the plaintiff has alleged a deprivation of a constitutional right," and only then "ask whether the right allegedly implicated was clearly established." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 841 n.5 (1998). The following Term, the Court stated that "[a] court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn* v. *Gabbert*, 526 U.S. 286, 290 (1999)). The Court stated that deciding the constitutional question first "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Id.*

In *Saucier*, the Court further explained the reasons for deciding the constitutional question first:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

533 U.S. at 201. This reasoning retains its validity. Most importantly, deciding the constitutional question first promotes the development of the law and the elaboration of constitutional rights. Without *Saucier*'s order of decisionmaking, rights that arise only in the civil context might never become sufficiently established to permit liability. Public officials would then have potentially limitless "free bites" in which their unconstitutional conduct will be uncorrected, contrary to the purpose of civil liability under § 1983.

2. Abrogating *Saucier* Would Stunt The Elaboration Of The Law. The Court recently explained that although *Saucier*'s order of decisionmaking contradicts the Court's "'policy of

avoiding unnecessary adjudication of constitutional issues,'" it is "'necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.'" *Scott* v. *Harris*, 127 S. Ct. 1769, 1774 (2007) (citations omitted; brackets added in original).

Absent *Saucier*'s directive, the "clearly established" requirement would retard constitutional development because lower courts are reluctant to issue constitutional holdings unless required to do so. *See* John M.M. Greabe, Mirabile Dictum*!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 410-11 (1999). "The danger is that district judges may exercise their discretion in a way that does not give the proper weight to [elaboration of constitutional law], by putting their own interest in clearing their dockets as efficiently as possible ahead of the Court's policy of elaborating constitutional norms." Wells, 60 S.M.U. L. Rev. at 1566.

While a flexible approach that "would *permit* the lower federal courts to decide the merits first," may seem attractive, experience has shown that they are reluctant to do so unless required." Sam Kamin, *An Article III Defense of Merits-First Decisionmaking*, 15 Geo. Mason L. Rev. ___ (forthcoming 2008), draft at 18, available at http://ssrn.com/abstract=1156421; Greabe, 74 Notre Dame L. Rev. at 410 n.35 (estimating that courts bypassed the merits in 51 of 79 recent qualified immunity cases in which no direct precedent prohibited the conduct at issue). The "clearly established" requirement will often be the path of least resistance for lower courts; permitting evasion

for the sake of efficiency would deprive the law of the case-to-case elaboration central to the Court's concerns in *Saucier*. *See* 533 U.S. at 201.

A study of the circuit court cases raising qualified immunity defenses showed that the percentage of courts articulating constitutional rights rose from 74 percent before *Saucier* and *Wilson* (when many courts held that the order of decisionmaking was not mandatory) to 99 percent in 2005, four years after *Saucier*. Hughes, 80 U. Colo. L. Rev at ___, draft at 2. In cases in which the court granted qualified immunity, the increase was even more dramatic, from 65 percent before *Saucier* to 98 percent afterward. *Id.* The Hughes study demonstrates that courts are likely to avoid deciding the constitutional question in a significant percentage of cases if they are permitted to do so, and thus the Court's decision to make the *Saucier* rule mandatory rather than advisory was justified.

3. *Saucier* Is A Recent Precedent Of This Court That Has Not Shown Itself To Be Unworkable. The Court has stated that "*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007). While *stare decisis* is not mandatory for procedural and evidentiary rules that do not incur reliance, it is still the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles" and "contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). The Court is not constrained to

follow precedent when the governing decision is "unworkable or badly reasoned," *id.*, but adhering to precedent "is usually the wise policy." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) (Brandeis, J., dissenting).

The *Saucier* order-of-battle is not "unworkable or badly reasoned." For the reasons stated above, it promotes the development of the law. Leaving constitutional questions open is particularly undesirable in § 1983 claims, where constitutional avoidance may preclude recovery even for recurring violations. And while a mandatory test imposes costs on lower courts, the resulting constitutional holdings provide clear guideposts for public officials to act within the boundaries of the law.

4. Petitioners' Suggested Modification Of The *Saucier* Rule Should Be Rejected. Petitioners' suggestion that the *Saucier* rule should be abrogated in Fourth Amendment cases is not workable. Pet. Br. 57-60. This case illustrates why: Petitioners raised the "consent once removed" theory only as a defense to civil liability, after the state courts held that they unlawfully entered Mr. Callahan's home without a warrant, consent, or exigent circumstances. If the Court were to hold that the lower courts need not decide whether a constitutional violation was alleged before moving on to the question of whether the right at issue was clearly established, it would encourage similar post-hoc rationalization and a search for "a case somewhere that provides comfort for" their actions. *Wilkie*, 127 S.Ct. at 2606. When police officers assert a novel theory, courts burdened by crowded dockets may well take the easier course and find the theory

has not conclusively been rejected, rather than engage in measured analysis that, as here, reveals the theory to be full of holes.

The Solicitor General agrees that "[t]he value of clarifying the applicable law is greatest" when resolving a Fourth Amendment question like the one here. U.S. Br. 24-25. The government notes that the rule has the "additional advantage" of maintaining analytical clarity in Fourth Amendment cases, in which the constitutional standard depends on the reasonableness of the officers' conduct. *Id.* at 26. If courts look solely to the "objective legal reasonableness" of officers' actions, they may conflate the Fourth Amendment and qualified immunity questions. *Id.* at 26-27.

Contrary to Petitioners' argument, *Saucier* may well produce *better* decisions on Fourth Amendment law "in civil rights cases, where the exclusionary rule does not hang over the judge's head like the sword of Damocles." Greabe, 74 Notre Dame L. Rev. at 433, citing Akhil Reed Amar, *Fourth Amendment First Principles*, 108 Harv. L. Rev. 757, 812 (1994). *Saucier* usefully encourages development of Fourth Amendment law away from the exclusionary rule's thumb on the scales.

Accordingly, the Court should decline to overrule the *Saucier* order of decisionmaking.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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CORDELL PEARSON; MARTY GLEAVE; DWIGHT JENKINS; CLARK THOMAS; and JEFFREY WHATCOTT,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

In this case, confidential informant Brian Bartholomew purchased methamphetamine from the Respondent Afton Callahan. After the purchase was complete, Bartholomew gave the signal to the Petitioners, police officers waiting outside. The Petitioners entered and arrested Callahan. Callahan then sued the officers under the Fourth Amendment, raising questions as to whether the officers' entry was lawful; whether the officers are entitled to qualified immunity; and whether this Court should overturn the "order of battle" mandated in *Saucier v. Katz*, 533 U.S. 194 (2001).

Callahan's defense of the Court of Appeals is based on three basic propositions. The first is that a significant difference exists between an officer entering a home to make an arrest at the signal of an undercover officer and entering at the signal of a confidential informant. The second proposition is that officers in undercover drug buy investigations can easily get warrants beforehand permitting entry the moment an informant signals a successful purchase. The third proposition is that a police officer in Utah should have known that Judge Posner was obviously wrong when he concluded for the Seventh Circuit that the technique used in this case was lawful.

All three propositions are mistaken. As a result, the judgment of the Court of Appeals should be reversed.

1) Callahan cannot persuasively distinguish entry following an undercover officer from entry following a confidential informant.

According to Callahan, the lawfulness of the officers' entry apparently hinges on the employment status of Brian Bartholomew.[1] If Brian Bartholomew had been employed as a police officer, Callahan suggests, the officers' entry would have been lawful. Resp. Br. at 25-31. Callahan argues that because Bartholomew was an informant, however, the entry was not only illegal, but its illegality was *clearly established*. Resp. Br. at 36-48. But Callahan has failed to assert any plausible reasons why Bartholomew's employment status is relevant – much less that it is so crucial that it could distinguish a perfectly lawful entry from one that only a "plainly incompetent" officer would believe was lawful. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Callahan offers four reasons why the constitutionality of the entry should rest on Bartholomew's

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[1] We add the caveat "apparently" because Callahan arguably does not take a firm position on the lawfulness of entry following an undercover police officer. *See* Resp. Br. at 29 ("Courts *may* reach a different result when an undercover police officer . . . enters a home with the occupant's consent.") (emphasis added); *see also* Resp. Br. at 19 n.5. However, Callahan's extensive treatment of the differences between entry following an informant and following an officer strongly suggests that Callahan agrees with the Tenth Circuit's position that the difference is dispositive. *See* Resp. Br. at 25-31.

employment status. First, Callahan suggests that an initial entry by an undercover officer creates exigencies that justify the entry when the undercover officer announces the arrest. Resp. Br. at 25-29. Callahan apparently assumes that an undercover officer will pull out his badge, declare "the gig is up!," and only then signal to the officers waiting outside. But officers do not make such announcements. Officers normally will signal just like confidential informants do: They give the signal covertly and then carry on as if they were just buying drugs. Any other approach presents a threat to officer safety. If the additional officers outside had trouble entering, an undercover officer who declared his identity could find himself in considerable danger before the other officers arrived.

Second, Callahan argues that officer safety concerns are absent when an initial entry is made by an informant. Resp. Br. at 26. However, protecting the safety of informants is just as important as protecting the safety of professional officers. Informants are essential to investigating narcotics cases, and serving as a confidential informant in drug cases is already extremely dangerous. "Drug dealers are not known for treating informers with compassion." *United States v. Bender*, 5 F.3d 267, 270 (7th Cir. 1993). If officers cannot protect the safety of their informants, informants will be unavailable to help the police fight the drug trade. This Court has recognized the importance of informant safety and its role in effective law enforcement by creating an informer's privilege: The identity of an informant is normally

withheld from criminal defendants unless the defendants need to know his identity to defend themselves. *See Roviaro v. United States*, 353 U.S. 53, 59 (1957). It makes little sense for the Court to protect informant safety with legal privileges but to let informants fend for themselves in the Fourth Amendment setting.

Third, Callahan argues that the distinction may also rest on possible differences between the statutory powers of officers and statutory powers of informants. Resp. Br. at 30-31. Callahan must overcome the fact that there are no statutory differences in arrest powers in Utah, and that any differences in other states are irrelevant for Fourth Amendment purposes under *Virginia v. Moore*, 128 S.Ct. 1598 (2008). *See* Pet. Br. at 36-38. Callahan responds with a creative argument: He asserts that the fact that there are no differences under Utah law cannot be considered because *Moore* renders state law irrelevant. Resp. Br. at 30-31. But *Moore* simply holds that state regulations of police powers to make arrests cannot create Fourth Amendment rights. *See Moore*, 128 S.Ct. at 1607 ("[W]hile States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections."). It does not hold that variations in state law require courts to presume maximum Fourth Amendment rights despite contrary state law.

Fourth, Callahan suggests that when a police officer is inside a home, the officer "is in a place he is legally entitled to be when probable cause is

established." Resp. Br. at 30. The same is true with private informants. The Fourth Amendment regulates informants exactly like professional officers: When a person acts as an agent of law enforcement, his conduct becomes fully "attributable to the Government." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). What matters is not the agent's employment status, but whether under a totality of the circumstances he acts as an instrument of the government.[2] *See also* 4 Blackstone, Commentaries *289 (noting that "[a]ny private person (and *a fortiori* a peace officer) that is present when any felony is committed is bound by the law to arrest the felon," and that "they may justify breaking open doors upon following such felon.")

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[2] The ACLU argues as *amicus curiae* that informants should trigger a special rule because officers are trustworthy and reliable while informants often are not. *See* Brief of ACLU at 14-21. But it is hard to see how the relative trustworthiness of officers and informants counsels in favor of a rule requiring a warrant in cases involving undercover drug buys. If the officers must obtain a warrant based on the informant's initial contact with a suspect, the effect will be to rely on the testimony of informants *more* rather than less. Notably, the examples of botched searches on page 20-21 of the ACLU's brief all appear to involve searches executed pursuant to search warrants. The reliability of the undercover individual is relevant to identifying whether probable cause exists, not whether a warrant should be required. Notably, in this case the Petitioners monitored Bartholomew over the wire transmission at all times while he was inside Callahan's trailer home. The officers made the decision to enter based in large part on what they heard rather than just relying on Bartholomew's "trustworthiness" or "reliability." *See* J.A. at 185, 187.

Finally, in response to the officers' argument that the line between officers and informants can blur, Callahan asserts without explanation that "it is not difficult to distinguish police officers from informants." Resp. Br. at 30 n.8. Petitioners invite Callahan to identify which of the following cases fall on which side of the line:

> (1) *State v. Gambrel*, 894 P.2d 235 (Kan. App. 1995), where the undercover who purchased narcotics from the defendant was a confidential informant who had been "deputized" and was paid $2,000 a month and reimbursed for college expenses;
>
> (2) *Mander v. Commonwealth*, 2003 WL 1701657 (Va. App. 2003), where the undercover who purchased crack cocaine from the defendant was a retired police officer who worked as a confidential informant and was paid $100 per undercover purchase;
>
> (3) *People v. Kaid*, 629 N.Y.S.2d 617 (N.Y.City Crim. Ct. 1995), where the undercover who purchased alcohol from the defendant was a police academy cadet;
>
> (4) *Schlesinger v. Councilman*, 420 U.S. 738 (1975), where the undercover who purchased marijuana from the defendant was an enlisted soldier in the United States Army working for Army criminal investigators;
>
> (5) *United States v. Berry*, 164 F.3d 844 (3rd Cir. 1999), where the undercover who purchased crack cocaine from the defendant was

a state police officer who had been deputized to act as a federal officer in another case but was not acting as a federal officer in that case;

(6) *State v. Nelson,* 560 P.2d 897 (Mont. 1977), where the undercover individual that purchased marijuana from the defendants was a confidential informant who was deputized, issued a gun permit, and described in the opinion as "an undercover narcotics agent."

As these cases suggest, clear lines between officers and informants can be elusive. Anyone can serve as an informant. As the Court emphasized in *Illinois v. Gates*, 462 U.S. 213, 232 (1983), the work of informants "come[s] in many shapes and sizes from many different types of persons." As a result, a new legal rule that distinguishes between informants and officers would be difficult to administer in practice.

2) An anticipatory warrant will be unavailable in a critical type of case, and a warrant requirement in this case would not advance legitimate Fourth Amendment interests.

Callahan argues that it was unreasonable to enter without a warrant because a warrant could have been easily obtained. According to Callahan, the police do not need to make warrantless entries in undercover buy cases because they can always obtain an anticipatory warrant. Resp. Br. at 32-34. This

theory is wrong because it misunderstands the limits of anticipatory warrants.

Under *United States v. Grubbs*, 547 U.S. 90 (2006), the police cannot obtain an anticipatory warrant unless they can establish ex ante "probable cause to believe the triggering condition *will occur*." *Id.* at 97 (emphasis in original). If the police seek an anticipatory warrant based on the triggering condition of the informant's signal, they must establish probable cause in their affidavit that the informant will be admitted inside the suspect's home and will actually be sold drugs. In other words, the government must not only show that there will be probable cause after the informant gives the signal; the government must also show probable cause that the signal will be given. *Id.*

This limitation of anticipatory warrants will leave the police unable to obtain an anticipatory warrant in an important category of case. Specifically, the officers may have reasonable suspicion that the target will sell drugs to an undercover officer or informant but will be unable to prove that the sale will actually occur. In such cases, the police will be unable to obtain an anticipatory warrant despite the great certainty that probable cause would exist as soon as the signal is given. The officers will have to wait patiently outside until one of them obtains a warrant based on the fresh information of the new undercover buy. Under Callahan's theory, this is true even if the undercover informant decides to make an

arrest: The officers can listen in on the wire to hear what is happening, but they cannot enter to help.

The facts of this case showcase the importance of the point. Bartholomew had told the officers that Callahan had a small amount of drugs in his home earlier that day. But the record shows that the officers did not know if the drugs would still be there by the time they returned. Small time dealers usually only keep drugs for "four or five hours at a time," and several hours had already passed. J.A. 246. As Petitioner Cordell Pearson testified, the officers believed it was "getting to a point to where Mr. Callahan might not have any drugs left at his residence" when the undercover buy occurred. J.A. 246. In these circumstances, it is uncertain whether the police could have shown probable cause that the undercover buy would succeed (and the triggering event would occur) to justify an anticipatory warrant.[3]

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[3] Remarkably, Callahan claims in his brief that "one of the Petitioners admitted that because the informant had seen the methamphetamine, they could have obtained a warrant" before the undercover buy. *See* Resp. Br. at 33 (citing J.A. 217). This is simply false, as a quick reference to the record demonstrates. During the state trial, counsel for Callahan attempted to build the case that the officers could have obtained a warrant *after the buy occurred*. He began by asking Petitioner Jenkins if Bartholomew's seeing the baggies of meth earlier that day "would give . . . some basis to get a search warrant." Jenkins responded, "Yes, very limited." J.A. 217. The question was whether Bartholomew's earlier visit could provide "some basis" for getting a warrant after the undercover buy, not whether it would have provided the sole basis for doing so beforehand.

More broadly, requiring a warrant in undercover buy cases would not advance the usual goals of the Fourth Amendment's warrant requirement. For example, officers executing warrants normally must knock and announce their presence, ensuring that homeowners know it is the police at the door rather than a burglar. *See United States v. Banks*, 540 U.S. 31, 35-37 (2003). But the facts of an undercover buy/bust would almost always justify a no-knock entry. Police can make a no-knock entry when they have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). This will almost always be the case when officers wish to enter a target's home to catch him "in the act" following an undercover buy. A drug dealer who has just made a sale and still has his drugs out in the open will dispose of them if he can.

Requiring a warrant for the entry would not serve the goals of the particularity requirement, either. The particularity warrant is designed to limit how far a search may extend, forbidding the general warrants that animated the passage of the Fourth Amendment. *See Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987). But as explained in the opening brief, a warrantless entry will often lead to a *narrower* search following the entry than one pursuant to a warrant. *See* Pet. Br. at 32-34. The warrant will permit a

wide-ranging search of the home, while a warrantless entry incident to arrest would not. *See id.*

Callahan disputes this position on the theory that a warrantless entry would lead to an extensive search eventually. According to Callahan, a police officer would be "derelict in his duty" if he did not follow up the warrantless entry by obtaining a search warrant to authorize the search of the target's home or else obtaining the target's consent. *See* Resp. Br. at 27-28 n.7. But if this is true, it is unclear why the law should impose a separate warrant requirement for the entry. The search warrant or the target's consent will fully satisfy the purposes of the warrant requirement separate from the entry. And sometimes no additional search will be necessary. Drug dealers in small communities often purchase only small amounts of drugs at a time, J.A. 246, and this means that all of the drugs often will be on or near the person arrested immediately after a buy. If the police recover drugs on the person incident to arrest, no additional search may be necessary.

Finally, a warrant requirement would not substantially advance the probable cause requirement, designed to ensure that a detached magistrate assesses when enough evidence supports the invasion of the home. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The law of arrests has traditionally distinguished the broad powers of warrantless arrest for crimes committed in a person's presence from the narrower powers of arrest when crimes are not committed in a person's presence. *See Atwater v. Lago*

Vista, 532 U.S. 318 (2001); 4 Blackstone, Commentaries, *287-290. The distinction reflects the fact that when a crime is committed in a person's presence, probable cause normally is not in doubt.

When an undercover buy is committed in an informant's presence – and in the virtual presence of the officers listening in from outside – probable cause is obvious. The cause to believe that some evidence of crime can be found inside the home will be overwhelming. As a result, an *ex ante* judicial assessment of probable cause in undercover drug purchase investigations ordinarily will not lead to more reliable assessments of probable cause.

3) Whether the court uses the label "consent once removed" or the individual doctrines from which this label derives, the officers' entry is constitutional if any one rationale permits it.

The Fourth Amendment issues in this case are complicated because the facts plausibly implicate several different doctrines and principles. Some doctrines relate to others and the lines among them are indistinct, resulting in a tendency for some of the briefs in this case to present arguments in mixed ways. This is particularly significant because, as explained in the Petitioners' opening brief, the "consent once removed" doctrine is a combination of two different Fourth Amendment rules. The Seventh Circuit cases that originated the label "consent once

removed" drew from decisions based on two long-standing theories: waiver of a reasonable expectation of privacy and search incident to arrest. *See* Pet. Br. at 44-45. As a result, Petitioners submit that the label "consent once removed" is best understood as an application of the two different theories that inspired it rather than a freestanding doctrine.

Whatever label the Court uses, it may be helpful to identify the range of Fourth Amendment arguments potentially raised in this case:

1. *Waiver of a reasonable expectation of privacy.* Under this theory, Callahan compromised his Fourth Amendment rights when he admitted Bartholomew into his home for purposes of an illegal transaction, waiving his reasonable expectation of privacy in the area exposed.

2. *Consent by the suspect.* Under this theory, the entry was lawful because Callahan consented to the officers' entry when he admitted Bartholomew inside.

3. *Consent by a third-party.* Under this theory, the entry was lawful because Bartholomew consented to the officers' entry and he had a right to consent to their entry.

4. *Search incident to arrest.* Under this theory, the entry was justified as it effectuated and assisted in the multiple arrests made inside Callahan's home.

5. *Consent once removed.* Under this theory, the entry was justified under the three-part "consent once removed" test articulated by the lower courts.

6. *Exigent circumstances.* Under this theory, the entry was justified by emergency circumstances that made it implausible to obtain a warrant.

It is helpful to review the main briefs with these six categories in mind. The Petitioners' opening brief focuses on arguments #1 and #4; it expressly disavows argument #3; and it explains that argument #5 is simply a combination of arguments #1 and #4. *See* Pet. Br. at 20-34, 44-45. The brief for the United States as *amicus curiae* takes a different approach. It begins with argument #2 and then turns to argument #5. *See* Br. of United States at 10-16. Finally, Callahan's brief begins with arguments #2 and #3, *see* Resp. Br. at 15-20; it then turns to argument #1, *id.* at 20-24; it next covers argument #5, *id.* at 25-26; then argument #6, *id.* at 26-27; then #4, *id.* at 27-29; and then it returns to argument #1, *id.* at 34-36.

The existence of different Fourth Amendment claims in this case has important implications for both the merits and the application of qualified immunity doctrine. On the merits, it means that a rejection of any one of the arguments leaves open the other arguments; the entry is constitutional if any one argument in favor of the entry prevails. On the qualified immunity issue, it means that decisions

applying any one of the above arguments did not clearly establish the law as to the other arguments.

4) The search incident to arrest exception is much broader – and the officers' waiver argument much narrower – than Callahan describes.

Callahan's brief presents an exceedingly narrow version of the "search incident to arrest" exception and an overly broad version of the officers' waiver argument. A few corrections are in order. First, Callahan is wrong to suggest that an arrest must begin before a search can be made incident to arrest. *See* Resp. Br. at 28. *Rawlings v. Kentucky*, 448 U.S. 98 (1980), is quite clear on this point. "Where the formal arrest followed quickly on the heels of the challenged search," *Rawlings* holds, it does not matter whether the search or the arrest occurs first. *Id.* at 111.

Callahan tries to distinguish *Rawlings* on the ground that it did not involve the precise facts here. *See* Resp. Br. at 27. But *Rawlings* did not reflect a fact-specific judgment that powers to search incident to arrest existed only in that case. Rather, *Rawlings* adopted the longstanding rule that the imminent prospect of an arrest triggers the powers to search incident to arrest even if no arrest has yet occurred. In the years before *Rawlings*, lower courts had adopted this rule quite widely. *See generally United States v. Riggs*, 474 F.2d 699, 704 (2d Cir. 1973) (Friendly, C.J.) (citing cases permitting searches

incident to arrest prior to arrest, and stating that lower court authorities have established the lawfulness of such searches "as firmly as anything short of a Supreme Court decision can."). Lower courts have interpreted *Rawlings* accordingly; the case stands broadly for the proposition that search incident to arrest powers exist before the formal arrest occurs. *See, e.g., United States v. Powell*, 483 F.3d 836, 839-42 (D.C. Cir. 2007) (search prior to arrest); *United States v. Smith*, 389 F.3d 944, 951-52 (9th Cir. 2004) (per curiam) (same). These cases indicate that the power to search incident to arrest existed when Bartholomew gave the prearranged signal that set the arrest in motion.

Second, Callahan wrongly suggests that the search incident to arrest authority requires exigent circumstances. Every arrest triggers the search incident to arrest doctrine regardless of the facts: "It is the fact of the lawful arrest which establishes the authority to search[.]" *United States v. Robinson*, 414 U.S. 218, 235 (1973). The doctrine is a "bright line rule" that does not depend on whether exigent circumstances exist in a particular case. *Knowles v. Iowa*, 525 U.S. 113, 117-18 (1998). The Court established this point with particular clarity in *Robinson*, where the Court considered and rejected a case-by-case approach:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may

> later decide was the probability in a particular arrest situation that weapons or evidence would, in fact, be found upon the person of the suspect. A . . . search incident to the arrest requires no additional justification.

Robinson, 414 U.S. at 235. That rationale applies fully in this case.

Finally, Callahan wrongly claims that the Petitioners' theory of the case has sweeping consequences. Callahan suggests that under the Petitioners' theory of the case, the police could enter homes following informants when they lacked probable cause. Resp. Br. at 34-35. This is incorrect. Callahan fails to appreciate the limited scope of Petitioners' argument. It is bounded both temporally and by the scope of the initial consent. *See* Pet. Br. at 23-26; *see also United States v. Bramble*, 103 F.3d 1475, 1478-79 (9th Cir. 1996) (noting that a government agent is limited from going beyond areas covered by the consent absent a separate constitutional basis for so doing); *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987) (emphasizing limits of consent once removed doctrine).[4]

Further, by the time the police can verify that a suspect has admitted an informant inside the home to

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[4] In this case, of course, the Task Force entered Callahan's home while Callahan was still inside, they immediately arrested him, and their additional search of Callahan's home was a permissible protective sweep following the arrest. J.A. at 190-95. Further, Callahan consented to the post-arrest search of his home. *See* Resp. Br. at 5 (citing J.A. 196).

sell him drugs, probable cause will necessarily exist. Indeed, most officers will demand far more than probable cause before relying on the rule from *Lewis v. United States*, 385 U.S. 206 (1966), that a drug dealer loses his reasonable expectation of privacy upon admitting a person inside the home to sell them drugs. If the officer happens to be wrong, and the conduct is innocent, the entry may violate the Fourth Amendment if not incident to arrest. This explains why the consent once removed cases in the Seventh Circuit adopted probable cause as a standard: Probable cause both justifies arrest (triggering the search incident to arrest power) and provides considerable certainty that the *Lewis* rule applies.

5) The officers are entitled to qualified immunity.

Callahan's approach to qualified immunity is plainly foreclosed by *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Creighton*, Anderson conducted a warrantless search of Creighton's home based on the erroneous belief that a bank robber was inside. Creighton sued Anderson, and the case rested in whether Anderson had exigent circumstances to enter. The Eighth Circuit held that disputed facts blocked a resolution of the merits at the summary judgment stage, but then went on to hold that qualified immunity could not apply to the case. According to the Eighth Circuit, qualified immunity doctrine had no place because the exceptions to the warrant requirement that permitted warrantless home entry

were "clearly established." *Creighton v. St. Paul*, 766 F.2d 1269, 1277 (8th Cir. 1985).

The Supreme Court vacated and remanded, forcefully rejecting the lower court's method. *Creighton*, 483 U.S. at 646. The Court emphasized that the inquiry must look to how clearly established law applies to specific facts, not whether an abstract legal proposition has been clearly established. *See id.* at 638-46. Twenty-one years later, Callahan now tries to revive the Creighton's losing argument. As in *Creighton*, Callahan argues that the law was clearly established because the Court has clearly established only two exceptions to the warrant requirement to enter the home: consent and exigent circumstances. *See* Resp. Br. at 43-45. This position was wrong when Creighton made it in 1987, and it remains wrong today. For qualified immunity to provide any protection, the key question must be whether a reasonable officer should have known that his conduct was illegal based on the facts, not abstract categories of law.

It doesn't help that Callahan simply ignores the decisions showing that this description of Fourth Amendment law isn't even incorrect, much less that its correctness is clearly established. Callahan relies on a 2008 e-newsletter by a private company that sells police training courses for the position that "there are only three legal ways to enter a person's home: with consent, with a warrant, or with exigent circumstances." Resp. Br. at 43 (quoting Brian Batterton, *Consent, Exigent Circumstances, and Warrantless*

Home Entry, The Public Agency Training Counsel, http://www.patc.com/weeklyarticles/print/consent,exigent-circumstances,warrantless-home-entry.pdf (2008)). But the e-newsletter is simply wrong. The Court has allowed warrantless home entries in other circumstances, including to search the homes of probationers, *United States v. Knights*, 534 U.S. 112 (2001); to search mobile homes, *California v. Carney*, 471 U.S. 386 (1985); and to search incident to arrest, *Washington v. Chrisman*, 455 U.S. 1 (1982).

Callahan also presents an erroneous picture of lower court caselaw governing follow-up entries. Callahan suggests that Judge Posner's decision in *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986), was an outlier, and that a police officer in 2002 should have realized that it was an obvious aberration and clearly incorrect. But Callahan ignores the fact that *Paul* was accepted by other courts until the Tenth Circuit's 2007 panel decision below. For example, in *People v. Galdine*, 571 N.E.2d 182 (Ill. App. 2d 1991), a confidential informant arranged to purchase cocaine in the defendant's office. The defendant showed the cocaine to the informant, and the informant then exited the building and signaled to the officers waiting outside. The court specifically agreed with *Paul* and held that the officers' subsequent warrantless entry was constitutional: "we conclude, as did the court in *Paul,* that the warrantless entry into defendant's office did not violate the defendant's rights under the fourth amendment." *Id.* at 191.

The Sixth Circuit's decision in *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000), is similar. *Pollard* involved an undercover entry by an informant and an officer together. After the defendant showed drugs to the officer and informant, the informant signaled to the officers waiting outside and they made a warrantless entry. The Sixth Circuit recited the Seventh Circuit's formulation of when follow-up entries were permitted:

> The undercover agent *or informant*: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers.

Id. at 648 (quoting *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995)) (emphasis added). The Sixth Circuit then adopted this test and agreed that it applied to permit the warrantless entry.

The *Pollard* court did not suggest that it made any difference whether the undercover individual was an informant or an officer (or both). To the contrary, the opinion agreed with the Seventh Circuit's formulation that was based on *Paul*. In fact, when the Sixth Circuit expressly decided the lawfulness of follow-up entries from informants in *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005), the *Yoon* court first had to consider whether *Pollard* had already adopted *Paul* back in 2000. *See Yoon*, 398 F.3d at 806-07. Like *Galdine* and *Pollard*, the *Yoon* decision demonstrates the weakness of Callahan's claim that *Paul* was

obviously an outlier. While *Yoon* was not handed down until 2005, after the 2002 entry in this case, *Yoon* specifically agreed with *Paul*. *Id.* at 807 ("This Court agrees with and adopts the sound reasoning of the Seventh Circuit in *Paul* . . . ."). If Judge Posner's opinion in *Paul* was so obviously wrong, someone forgot to tell the Sixth Circuit.

Callahan briefly discusses four cases that he claims clearly establish that the officers' warrantless entry was unconstitutional. *See* Resp. Br. at 40. Callahan does not discuss these cases in detail, and with good reason: on close scrutiny, they shed no light. One of the four cases, *Carranza v. Georgia*, 467 S.E.2d 315 (Ga. 1996), concerns the lawfulness of home arrests. *Carranza* does not address whether the entry to arrest was consensual or whether such entry was justified under any theory other than exigent circumstances. Further, its holding appears to rely on sources beyond the Fourth Amendment. The Georgia Supreme Court explained its holding as the product of "careful consideration" of Georgia statutory arrest law, "the critical safeguard of individual privacy" represented both by the Georgia state constitution and the Fourth Amendment, and "the consequences of this ruling on an important, effective law enforcement procedure." *Id.* at 318. This conclusion did not

and could not clearly establish a Fourth Amendment rule.[5]

The remaining three cases, *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000), *United States v. Templeman*, 938 F.2d 122 (8th Cir. 1991), and *United States v. Beltran*, 917 F.2d 641 (1st Cir. 1991), all reach the unremarkable conclusion that the entries in those cases were not permitted by the exigent circumstances exception. Of course, this is exactly the same conclusion that Judge Posner reached in *United States v. Paul*. In *Paul*, Judge Posner rejected the government's exigent circumstances theory but then reasoned that the entry was permitted by consent. *See Paul*, 808 F.2d at 647-48. Given that *Paul* rejected the exigent circumstances exception, it is unclear how cases echoing *Paul*'s exigency analysis are supposed to "clearly establish" that other parts of *Paul* are incorrect.

The cases cited by Callahan show that some government lawyers were unaware of *Paul* and the "consent once removed" cases, and they therefore failed to make the argument. That was true in the state criminal prosecution of Callahan, of course. The

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[5] It is unclear why Professor LaFave relied on *Carranza* starting in his 2003 pocket part update as if it established a clear Fourth Amendment rule. *See* 3 LAFAVE, SEARCH & SEIZURE 2004 Pocket Part 72-73 (2003) (citing *Carrranza*). In any event, Callahan does not explain how a sentence added in a 2003 Pocket Part update was supposed to clearly establish the law on March 19, 2002. *See* Resp. Br. at 42 n.12.

lawyers for the state of Utah apparently didn't think of the claim. But the government's failure to make an argument does not "clearly establish" that it would have failed if it had been tried. *Cf. Brown v. United States*, 932 A.2d 521, n.8 (D.C. 2007) (noting that where the "consent once removed" doctrine was not argued by the government, it became the "proverbial elephant in the room."). Further, the record in this case offers a significant basis for an exigency argument that was absent in cases like *Santa*, *Templeman*, and *Beltran*. The record shows that the officers knew the drugs wouldn't last for more than a few hours, J.A. 246, bringing the facts very close to those decisions that have allowed exigent entries in narcotics cases. *See, e.g., United States v. Samboy*, 433 F.3d 154 (1st Cir. 2005); *United States v. Gonzalez*, 967 F.2d 1032 (5th Cir. 1992); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990).[6]

Finally, the Court should ignore Callahan's argument that the officers are not entitled to qualified immunity because the officers make no claim that they subjectively relied on the Seventh Circuit's decisions. *See* Resp. Br. at 48. The officers make no claims about their subjective intentions because this

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[6] Indeed, the officers advanced the argument that the entry was justified by exigent circumstances in their memorandum to the district court. If the Court affirms the Tenth Circuit, the officers will reassert that exigent circumstances justified their entry.

Court has deemed their subjective intentions irrelevant. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

6) This is an appropriate case to overrule *Saucier v. Katz*.

This case presents an appropriate vehicle in which to overrule *Saucier v. Katz*, 533 U.S. 194 (2001). *Saucier* is most burdensome when the constitutional question proves difficult but the qualified immunity outcome is clear. In the Petitioners' view, this is such a case. The Fourth Amendment issues raised here are complicated, while the qualified immunity analysis is straightforward.

Callahan argues that *Saucier* should be retained because it leads to more civil cases being adjudicated, which Callahan posits would lead to better Fourth Amendment decisionmaking. *See* Resp. Br. at 55-56. Callahan hypothesizes that without *Saucier*, courts overly burdened by 42 U.S.C. § 1983 actions would not reach the merits in civil cases such as this. Instead, the law would develop only in criminal cases where the courts will be more willing to rule for the government. *Id.* But even assuming that there is a difference between how courts resolve Fourth Amendment cases in the civil and criminal context, Callahan's hypothesis is unrealistic in light of *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, civil suits that imply the invalidity of a criminal conviction

"must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487. Put another way, criminal defendants normally can't sue.

Under *Heck*, most civil actions under the Fourth Amendment involve either innocent individuals who were wrongly targeted or excessive force claims that do not imply the invalidity of a criminal conviction. Fourth Amendment law ends up developing on two parallel tracks. Suppression motions develop the law in cases involving the discovery of criminal evidence, and civil cases develop the law in cases that do not. Petitioners submit that this bifurcation justifies a narrow rule limiting the mandatory two-step of *Saucier* to cases that do not involve fruits of the poisonous tree. *See* Pet. Br. at 58-60 (proposing such a rule); *see also* Brief of Liberty Legal Institute as *Amicus Curiae* at 15-16 (endorsing this approach). This approach recognizes that *Heck v. Humphrey* effectively divides the world of Fourth Amendment cases into criminal cases that involve criminal fruits and civil cases that do not. If *Saucier* is needed to develop the law, it is needed in the latter cases and not the former.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 07-751

In the Supreme Court of the United States

CORDELL PEARSON, ET AL., PETITIONERS

v.

AFTON CALLAHAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

1. Whether the entry of police officers into respondent's residence, immediately after an undercover informant alerted the officers that criminal activity was taking place in the house, was consistent with the Fourth Amendment.

2. Whether petitioners were entitled to qualified immunity from respondent's damages suit.

3. Whether the Court's decision in *Saucier* v. *Katz*, 533 U.S. 194 (2001), should be overruled.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case involves a Fourth Amendment challenge to an arrest performed during an undercover law-enforcement operation. That challenge arises in the context of a personal-capacity damages action against government officers who are alleged to have violated the Constitution. The Court's decision will directly apply to similar federal law-enforcement activities, as well as to suits against individual federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982) (noting that the Court's decisions equate the qualified immunity of state officials sued under 42 U.S.C. 1983 with the immunity of federal officers sued directly under the Constitution).

The United States therefore has a substantial interest in the Court's resolution of this case.

STATEMENT

1. This damages action arises out of a police entry into respondent's residence on the night of March 19, 2002. Petitioners are police officers who had arranged for a confidential informant, Brian Bartholomew, to enter respondent's house, with respondent's consent, to purchase methamphetamine. Petitioners monitored the conversation inside the house through a wire that Bartholomew wore. Pet. App. 2-3, 31-34.

After Bartholomew entered the house, he gave respondent a marked $100 bill in exchange for a bag of methamphetamine taken from a larger quantity of the drug stored in respondent's kitchen freezer. Bartholomew then signaled to petitioners that the narcotics sale had been completed. Immediately thereafter, petitioners entered the house through a porch door and saw respondent drop a plastic bag later determined to contain methamphetamine. Respondent was arrested and charged with possession and distribution of methamphetamine. The entry of respondent's house was conducted without a search or arrest warrant. Pet. App. 3-4, 34-36.

2. During state criminal proceedings, respondent moved to suppress the methamphetamine and drug paraphernalia found in his residence. The state trial court denied the motion to suppress, holding that the warrantless search of respondent's house was justified by exigent circumstances. Respondent entered a conditional guilty plea, reserving his right to appeal the denial of the motion to suppress. Pet. App. 4, 37.

The Utah Court of Appeals reversed respondent's conviction. *State* v. *Callahan*, 93 P.3d 103 (Utah Ct. App. 2004). On appeal, "the State concede[d] that the trial court erred in finding that the entry was justified by exigent circumstances." *Id.* at 106. The court of appeals rejected, as unsupported by the record, the State's alternative argument that suppression was unwarranted because the officers would inevitably have discovered the evidence through alternative means. *Id.* at 106-107; see Pet. App. 4, 37-39.

3. Pursuant to 42 U.S.C. 1983, respondent then filed a civil damages action against petitioners and others in federal district court, alleging that petitioners' conduct had violated his rights under the Fourth Amendment. The district court granted petitioners' motion for summary judgment. Pet. App. 30-59.

The district court first considered "the doctrine of 'consent-once-removed.'" Pet. App. 47. Under that doctrine, "[t]he consent [to enter a residence] given to the first person, generally a law enforcement officer but sometimes an informant, is then transferred to the entering police officers once the first person requests assistance from the police based on probable cause." *Ibid.* The court noted that "the 'consent-once-removed' doctrine has been upheld and applied in the Sixth, Seventh, and Ninth Circuits," and "has been explicitly applied not only to undercover police agents, but also to government and confidential informants in the Sixth and Seventh Circuits." *Id.* at 53. Rather than decide whether the police entry in this case was constitutional, however, the district court stated that "the simplest approach is to assume that the Supreme Court will ultimately reject the doctrine and find that searches such as the one in

this case are not reasonable under the Fourth Amendment." *Ibid.*

Even assuming the existence of a constitutional violation, however, the district court concluded that petitioners were entitled to qualified immunity from suit because their conduct had not violated any clearly-established constitutional right. Pet. App. 53-58. The court recognized that the general principles underlying respondent's constitutional claim—*e.g.*, that "warrantless searches of a person's home are presumptively unreasonable"—had been clearly established at the time of the police entry in this case. *Id.* at 54-55. The court explained, however, that "on the specifics of this case, the officers had a reasonable argument that the 'consent-once-removed' doctrine justified their actions," particularly given the acceptance of that doctrine by three federal courts of appeals. *Id.* at 55.

4. A divided panel of the court of appeals reversed. Pet. App. 1-29.

a. The court of appeals held that petitioners' conduct violated respondent's Fourth Amendment rights. Pet. App. 8-14. The court recognized that "[t]he 'consent-once-removed' doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." *Id.* at 11. The court further acknowledged that "[t]he Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers." *Ibid.* The court held, however, that it was appropriate to distinguish for these purposes between undercover police officers and private citizens serving as confidential informants, and that Tenth Circuit case law supported application of the

"consent once removed" doctrine only as to the former. *Id.* at 11-14.

b. The court of appeals further held that the Fourth Amendment right it recognized was clearly established at the time of petitioners' allegedly unconstitutional conduct. Pet. App. 14-18. The court stated that, "[i]n this case, the relevant right is the right to be free in one's home from unreasonable searches and arrests." *Id.* at 15. The court determined that, under the clearly established precedents of this Court and the Tenth Circuit, "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions," *id.* at 16, and that "the only two exceptions to the warrant requirement are consent and exigent circumstances," *id.* at 17. Against that backdrop, the court concluded, petitioners could not reasonably have believed that their conduct was lawful because petitioners "knew (1) they had no warrant; (2) [respondent] had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them." *Ibid.*

c. Judge Kelly dissented. Pet. App. 18-29. He explained that, by inviting Bartholomew into his house and participating in a narcotics transaction there, respondent had compromised the privacy of the residence and had assumed the risk that Bartholomew would reveal their dealings to the police. *Id.* at 22-23. Judge Kelly therefore would have held that "no constitutional violation occurred in this case." *Id.* at 26.

Judge Kelly further concluded that, even if petitioners' conduct was found to be unlawful, petitioners were entitled to qualified immunity from respondent's damages suit. Pet. App. 26-29. He explained that the purported constitutional right at issue in this case "is the

right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause." *Id.* at 27. Judge Kelly concluded that no such right was "clearly established" at the time of petitioners' entry and that petitioners were accordingly entitled to qualified immunity. *Id.* at 29.

SUMMARY OF ARGUMENT

The court of appeals erred in allowing this damages action to proceed against petitioners.

I. Petitioners' warrantless entry into respondent's house in response to Bartholomew's signal did not violate the Fourth Amendment. The general warrant requirement for effectuating an arrest within the home is based on the fact that the entry needed to perform the arrest typically entails an intrusion on the arrestee's privacy. Here, however, respondent's consent to Bartholomew's entry provided an independent basis for the incursion on privacy and thereby obviated the need for a judicial warrant. Although respondent did not specifically consent to the entry by petitioners themselves, their observation of the same portion of the house to which Bartholomew had already been admitted caused no relevant incremental intrusion on respondent's privacy.

By inviting Bartholomew into his home and committing a felony in his presence, respondent rendered himself subject to a warrantless arrest. Petitioners' entry served the substantial government interest in ensuring that sufficient law-enforcement personnel were present to perform the arrest effectively and without undue risk of violent resistance, in a highly volatile situation involv-

ing the presence of substantial quantities of drugs. The fact that Batholomew was a civilian informant rather than an undercover police officer does not alter the result under the Fourth Amendment. Bartholomew functioned as a government agent; his entry pursuant to respondent's consent exposed respondent's residence to the government's view; from respondent's perspective, he stood in the same shoes as an undercover police officer; and Bartholomew was authorized by state law to perform an arrest after observing respondent's commission of a felony.

II. Regardless of the ultimate disposition of the Fourth Amendment question presented here, petitioners are entitled to qualified immunity from suit. Under established immunity principles, petitioners are not subject to personal liability under 42 U.S.C. 1983 unless the body of case law in effect at the time they entered respondent's house gave clear notice that the entry was unconstitutional in the specific situation that petitioners confronted. When the challenged entry occurred, three courts of appeals had approved the "consent once removed" doctrine; none had disapproved it; and the only court of appeals to consider the question had held that the doctrine applies where (as here) the initial entry is made by a civilian informant acting as a government agent. Various decisions of this Court further supported the conclusion that petitioners' entry was lawful. Officers in petitioners' position therefore could reasonably have believed that their conduct was constitutional, and petitioners accordingly are entitled to qualified immunity.

III. Although the holding and the bulk of the qualified-immunity analysis in *Saucier* v. *Katz*, 533 U.S. 194 (2001), remain sound and therefore should not be over-

ruled, this Court should modify the rigid two-step framework described in *Saucier*. Under *Saucier*, a lower court in a personal-capacity damages suit cannot ask whether the right alleged to have been violated was "clearly established" at the relevant time unless the court has first determined that a constitutional violation has been adequately alleged or proved. Although initial consideration of the disputed constitutional issue will often facilitate sound judicial decision-making, in other cases the *Saucier* approach will entail significant costs and provide few countervailing benefits. A categorical rule requiring lower courts in personal-capacity suits to decide the constitutional issue on the merits before proceeding to the question whether the plaintiff's alleged right was clearly established at the time of the challenged conduct is therefore unwarranted. Accordingly, the analytic framework described in *Saucier* should be modified to grant lower courts the same type of flexibility that this Court itself has exercised in deciding qualified-immunity issues—*i.e.*, the flexibility to skip the first step of the inquiry when considerations of sound judicial administration weigh heavily in favor of deciding the case under the second step. See *Brosseau* v. *Hagen*, 543 U.S. 194, 198-201 (2004) (per curiam).

In this case, several considerations point in favor of deciding the constitutional issue first, including the fact that the constitutional question is one of recurring importance whose resolution does not turn on the particular facts of the case. But however this Court resolves the Fourth Amendment question, petitioners are entitled to qualified immunity because, even if a constitutional violation occurred, petitioners did not violate any "clearly established" rights in the situation they confronted.

ARGUMENT

In deciding whether a government officer is entitled to qualified immunity from a personal-capacity damages action, this Court has applied a two-step inquiry. First, the Court considers whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Second, if a constitutional violation has been adequately alleged or proved, the Court considers whether "the right was clearly established * * * in light of the specific context of the case." *Ibid.* In this case, both inquiries point to the conclusion that petitioners are entitled to dismissal of respondent's suit.

A. Petitioners' Warrantless Entry Into Respondent's Residence In The Circumstances Here Was Consistent With The Fourth Amendment

1. When law-enforcement officers have probable cause to believe that an individual has committed a felony, they may arrest the suspect in a public place without first securing a judicial warrant. See *United States* v. *Watson*, 423 U.S. 411, 414-424 (1976). By contrast, a warrant is ordinarily required before an arrest may be effected within the suspect's house. See *Payton* v. *New York*, 445 U.S. 573, 583-603 (1980). That distinction reflects the fact that the arresting officer's entry into the home entails an intrusion into privacy interests that does not occur when an arrest is made in a public place. See *id.* at 586-590.

In distinguishing between arrests in public places and arrests within the home, the Court in *Payton* drew on established constitutional rules governing seizures of property. Thus, the Court explained that, although "searches and seizures inside a home without a warrant

are presumptively unreasonable," it is "well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant," since "[t]he seizure of property in plain view involves no invasion of privacy." 445 U.S. at 586-587. The Court concluded that "this distinction has equal force when the seizure of a person is involved." *Id.* at 587.

2. The general rule described above—*i.e.*, that a police officer must obtain a judicial warrant before entering a suspect's home—is subject to exceptions. Of particular relevance to this case, a warrantless entry is reasonable, and therefore constitutionally permissible, if it is undertaken with the occupant's consent. See, *e.g.*, *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006); *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). Consent provides a constitutionally valid basis for entry even when it is obtained through misrepresentations about the officer's identity or purpose, as when an undercover operative poses as a fellow participant in criminal activity. See, *e.g.*, *Hoffa* v. *United States*, 385 U.S. 293, 302-303 (1966); *Lewis* v. *United States*, 385 U.S. 206, 210-211 (1966).

Under the "plain view" doctrine articulated in this Court's precedents, officers who enter a residence with the occupant's consent and observe incriminating items inside may seize the items without first obtaining a warrant. The Court has described the prerequisites to "plain view" seizures as follows: "[I]f police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota* v. *Dickerson*, 508 U.S. 366, 375 (1993); see, *e.g.*, *Horton* v. *California*, 496 U.S. 128, 136-137 (1990). The Court in

Horton applied that doctrine to a "plain view" seizure within the defendant's home. See *id.* at 130-131, 142. The Court explained that, so long as the seizing officer is lawfully present within the residence, the seizure of physical property does not require a warrant because it causes no additional invasion of the occupant's privacy. See *id.* at 133, 141-142. Although the entry in *Horton* was lawful because it was authorized by a judicial warrant (which specified items different from those that were ultimately seized), see *id.* at 131, the "plain view" doctrine applies equally when law-enforcement officers enter a residence pursuant to an exception to the warrant requirement, see *id.* at 135, 140; *Arizona* v. *Hicks*, 480 U.S. 321, 326 (1987).

The reasoning of this Court's "plain view" decisions equally supports the warrantless arrest of an individual who consents to a police entry into his home and thereafter commits a crime in the officer's presence. In holding that a warrantless arrest within the home is ordinarily unlawful, the Court in *Payton* did not suggest that the seizure of the arrestee's person, in and of itself, requires prior judicial authorization. To the contrary, the Court recognized, and did not cast doubt upon, its holding in *Watson* that warrantless arrests may be effected in public places. See *Payton*, 445 U.S. at 574-575, 600-601. An arrest within the home typically requires a warrant not because of the constraints it imposes upon the individual's liberty (which are unlikely to vary in any relevant way depending on where the arrest occurs), but because the entry to effect the seizure entails a breach of the individual's *privacy* that has no analog in a public-place arrest. See *New York* v. *Harris*, 495 U.S. 14, 18 (1990). That rationale for the warrant requirement does not apply when the breach of privacy has a separate consti-

tutional justification, as when the occupant of a residence has consented to the arresting officer's entry.

3. For the foregoing reasons, a police officer (whether undercover or in uniform) who enters a private residence with the occupant's consent, and thereafter observes the commission of criminal acts within the home, may arrest the perpetrator without prior judicial authorization. Like an arrest in a public setting, or the seizure of incriminating items lawfully observed in plain view, an arrest under those circumstances entails no intrusion on privacy beyond that inherent in the initial warrantless entry. Where that entry is authorized by the occupant's consent, no warrant is needed for the ensuing arrest.

In two respects, this case differs from the fact pattern described above. First, although respondent consented to Barthomolew's entry into the residence, respondent did not specifically consent to the entry of petitioners, who waited outside the house until the narcotics sale had been completed and then entered in response to Bartholomew's signal. Second, Bartholomew himself was not a law-enforcement officer, but was instead a private citizen acting in cooperation with the police. For the reasons that follow, neither of those factors rendered the police entry here unconstitutional.

a. As articulated in numerous lower-court decisions, "[t]he 'consent-once-removed' doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." Pet. App. 11; see, *e.g.*, *United States* v. *Pollard*, 215 F.3d 643, 648-649 (6th Cir.), cert. denied, 531 U.S. 999 (2000); *United States* v. *Bramble*, 103 F.3d 1475, 1478-1479 (9th Cir.

1996); *United States* v. *Diaz*, 814 F.2d 454, 459 (7th Cir.), cert. denied, 484 U.S. 857 (1987). The two courts of appeals that have addressed the question have held that the "consent once removed" doctrine also applies when the initial entrant into the home is a private informant rather than an undercover police officer. See *United States* v. *Yoon*, 398 F.3d 802, 806-808 (6th Cir.), cert. denied, 546 U.S. 977 (2005); *United States* v. *Paul*, 808 F.2d 645, 648 (7th Cir. 1986).

The "consent once removed" doctrine is premised on the recognition that, when an individual consents to the entry into his home of an undercover police officer or informant, and the officer or informant witnesses the commission of a crime within the residence, the entry of additional officers to assist in effecting an arrest works no constitutionally significant incremental interference with the resident's privacy interests. As the Seventh Circuit has explained, "[t]he interest that the *Payton* decision protects is the interest in the privacy of the home, and [that interest] has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him." *Paul*, 808 F.2d at 648. When the prerequisites to the "consent once removed" doctrine are satisfied, the resident suffers no relevant intrusion on privacy beyond that which would occur if the undercover officer to whom consent was given performed the arrest himself.

While the entry of additional officers entails no significant incremental burden on the privacy of an individual who has already consented to the presence of an undercover operative, the government has a substantial interest in ensuring that sufficient law-enforcement personnel are present to perform the arrest effectively and without undue risk of violent resistance. This is particu-

larly true in circumstances such as those confronted by petitioners, who were entering a house in which a drug sale had just taken place and a large quantity of drugs was stored in respondent's freezer. Arrests for contraband violations, like searches for contraband, "may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Maryland* v. *Wilson*, 519 U.S. 408, 414 (1997) (quoting *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981)).

In the circumstances where the "consent once removed" doctrine has been applied, depriving an undercover operative of reinforcements to assist in an arrest would thus pose a threat to officer safety. Particularly given the insignificant incremental burden on privacy that the presence of additional officers entails once the occupant has consented to the initial entry, prevention of that threat is a constitutionally sufficient justification to make the warrantless entry reasonable. Cf. *Virginia* v. *Moore*, 128 S. Ct. 1598, 1604 (2008) ("When history has not provided a conclusive answer, [this Court] ha[s] analyzed a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'") (quoting *Wyoming* v. *Houghton*, 526 U.S. 295, 300 (1999)).

This Court has recognized in other contexts that a law-enforcement officer's *re*-examination of items that have already been exposed to view ordinarily entails no substantial intrusion on privacy interests. Thus, in *Illinois* v. *Andreas*, 463 U.S. 765, 767, 771-772 (1983), the

Court held that a Drug Enforcement Administration agent's reopening of a container was not a Fourth Amendment "search" because the container had previously been opened and its contents ascertained by a customs inspector. In *United States* v. *Jacobsen*, 466 U.S. 109, 111-112, 119-120 (1984), the Court held that no privacy interest was invaded when federal agents re-examined the contents of a package that had previously been inspected by employees of a private delivery service, since the expectation of privacy had already been frustrated by the private search (which did not implicate the Fourth Amendment). The Court made clear that the agent's examination did not "further infring[e] [the addressee's] privacy"; "[t]he agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." *Id.* at 119-120.

It is also well established that, when an undercover operative—whether a police officer or informant—enters a private residence pursuant to the occupant's consent, he may wear a concealed recording device in order to create an accurate record of events that transpire during his presence. See, *e.g.*, *Lopez* v. *United States*, 373 U.S. 427, 430, 438-439 (1963). The Court in *Lopez* explained that the case "involve[d] no 'eavesdropping' whatever in any proper use of that term" because, *inter alia*, the recording device "was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself." *Id.* at 439. The necessary implication of that decision is that no constitutionally significant incremental burden on privacy occurs when formerly private information obtained by a government agent through the consent of the putatively aggrieved party is passed along to other law-enforcement officers. Similarly here, petitioners' entry

into the portion of respondent's residence that Bartholomew had already been permitted to see revealed no private information that could not equally have been revealed through Bartholomew's recounting of his observations.

b. The fact that Bartholomew was a civilian informant rather than an undercover police officer does not alter the constitutional result. Like an undercover officer, Bartholomew was an agent of the government. He had arranged with petitioners to serve as an undercover operative. He was lawfully present in respondent's residence, and he was entitled to wear an electronic device to transmit his conversation with respondent to officers waiting outside. Moreover, from respondent's perspective, there was no meaningful difference between consenting to the entry of an undercover officer dressed as a civilian, and consenting to the entry of a civilian informant posing as a drug buyer.

The principal rationale for the "consent once removed" doctrine—*i.e.*, that the entry of additional law-enforcement personnel into an area whose privacy has already been compromised imposes no significant incremental burden on privacy—applies equally to cases involving civilian informants used as undercover agents. In *Jacobsen*, this Court held that, when law-enforcement officers re-examined suspicious materials that had previously been inspected by employees of a private delivery service, "[t]he additional invasions of * * * privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." 466 U.S. at 115; see *id.* at 119-120. That principle applies with even greater force here, where the initial entry was made with the occupant's consent and the individual entering was (unbeknownst to the occupant) him-

self a government agent. The privacy of the home having already been lawfully exposed to the government's eyes, the entry of additional officers did not materially expand the scope of the intrusion.

In addition, as Judge Kelly explained in dissent, "citizens (including confidential informants) in Utah, and nearly every other state, possess the power to arrest another individual who commits a felony in their presence." Pet. App. 24-25. The police, of course, are unlikely to direct a confidential informant to arrest the wrongdoer once a controlled narcotics buy has been made. The existence of serious practical obstacles to an arrest by the informant, however, did not alter the fact that respondent was subject as a statutory and constitutional matter to a warrantless arrest within his home once Bartholomew observed his commission of a felony. As in "consent once removed" cases involving undercover police officers, petitioners' entry into respondent's home facilitated the safe and effective performance of an arrest to which respondent was legally susceptible even before the entry. See pp. 13-14, *supra*; cf. *Lopez*, 373 U.S. at 439 (upholding the admission into evidence of a federal agent's clandestine tape recording of his conversation with the defendant, and explaining that the defendant had no "constitutional right to rely on possible flaws in the agent's memory"); *Jacobsen*, 466 U.S. at 119 (similar).

As the dissenting judge below also correctly observed, Bartholomew, though not a government employee, was acting under the direction of police officers during the events in question. See Pet. App. 24 (Kelly, J., dissenting). Bartholomew therefore functioned as a government agent and was subject to the constraints of the Fourth Amendment. See *id.* at 24-25; *Coolidge* v.

New Hampshire, 403 U.S. 443, 487 (1971). That fact reinforces the conclusion that Bartholomew, while lawfully within respondent's residence, had the same constitutional authority as an undercover police officer to summon additional officers to effectuate an arrest when a felony was committed in his presence.

B. Petitioners Are Entitled To Qualified Immunity From Respondent's Damages Action

Whatever the ultimate resolution of the Fourth Amendment question presented here, respondent's damages suit under 42 U.S.C. 1983 cannot go forward. Under this Court's precedents, petitioners are entitled to qualified immunity from that suit unless their conduct violated constitutional or statutory rights that were "clearly established" at the time of the events in question. See, *e.g.*, *Scott* v. *Harris*, 127 S. Ct. 1769, 1774 (2007); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The ultimate focus of the inquiry is on the "objective legal reasonableness," *id.* at 819, of petitioners' conduct in light of the legal understandings that prevailed when they entered respondent's dwelling. That reasonableness inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201; see *Brosseau* v. *Hagen*, 543 U.S. 194, 198-199 (2004).

In concluding that petitioners had violated respondent's "clearly established" rights, the court of appeals stated that "[i]n this case, the relevant right is the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15. By focusing the qualified-immunity inquiry at far too "high a level of generality," *Brosseau*, 543 U.S. at 199, the court of appeals fundamentally departed from this Court's teachings.

1. This Court has repeatedly cautioned against the very mode of analysis that the court of appeals employed in this case. For example, in *Anderson* v. *Creighton*, 483 U.S. 635 (1987), the Court explained:

> The operation of [the qualified-immunity] standard * * * depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Id. at 639.

To prevent the undue expansion of liability in cases involving reasonable mistakes of law or fact, the Court in *Anderson* emphasized, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640. The Court has reiterated that important principle in subsequent

qualified-immunity cases. See, *e.g.*, *Brosseau*, 543 U.S. at 199-200; *Saucier*, 533 U.S. at 202.

2. Consistent with this Court's decisions, the constitutional right alleged to have been violated here must be defined at an appropriate level of specificity in order to ensure that petitioners are not subjected to damages liability for conduct that they might reasonably have believed was lawful. In describing the right at issue as "the right to be free in one's home from unreasonable searches and seizures," Pet. App. 15, the court of appeals framed the right at far too high a level of generality. As Judge Kelly explained, "[p]roperly characterized, the right at issue in this case * * * is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause." *Id.* at 27 (Kelly, J., dissenting). Petitioners are entitled to qualified immunity unless the existence of such a right had been established beyond reasonable dispute at the time of the events that gave rise to this suit. See, *e.g.*, *Saucier*, 533 U.S. at 202; *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Far from clearly establishing a right against the type of intrusion at issue here, the body of case law that existed when petitioners entered respondent's house supported the legality of that entry. At that time, three courts of appeals had endorsed the "consent once removed" doctrine and none had rejected it. See pp. 12-13, *supra*. The Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants, see *Paul*, 808 F.2d at 648; the Sixth Circuit reached the same conclusion after the events that gave rise to respondent's

suit, see *Yoon*, 398 F.3d at 806-808; and no court of appeals has issued a contrary ruling. In *Wilson* v. *Layne*, 526 U.S. 603 (1999), the Court found that the defendant officers' conduct violated the Fourth Amendment, *id.* at 609-614, but it nevertheless held that the officers were entitled to qualified immunity, *id.* at 614-618. The Court explained, *inter alia*, that a circuit split on the relevant issue had developed after the events that gave rise to suit, and it concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 618. Petitioners' entitlement to qualified immunity is significantly clearer, since no court of appeals had disapproved the police practice at issue here until the Tenth Circuit ruled in this case.

3. The court of appeals' reliance (Pet. App. 15-16) on *Groh* v. *Ramirez*, 540 U.S. 551 (2004), is misplaced. The Court in *Groh* noted the established general rule that, "absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Id.* at 564. The Court concluded that the defendant officers were not entitled to qualified immunity "[b]ecause not a word in any of [the Court's] cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet." *Id.* at 565. That analysis simply reflects the principle that official conduct may violate "clearly established" rights if no plausible argument can be made in support of its legality, even if no court has held that precise conduct to be unlawful. See, *e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 739-741 (2002); *Anderson*, 483 U.S. at 640; *Mitchell* v. *Forsyth*, 472 U.S. 511, 535 n.12 (1985).

Petitioners' assertion of qualified immunity rests on far more than the *absence* (at the time of their entry into

respondent's home) of any authoritative judicial decision that had specifically rejected the "consent once removed" doctrine or held it inapplicable to cases involving private informants. In addition to the court of appeals decisions that had endorsed and applied the doctrine, this Court had held that the Fourth Amendment does not require a warrant for seizures of persons (see *Watson*, 423 U.S. at 414-424) or property (see, *e.g.*, *Horton*, 496 U.S. at 136-137) that do not intrude on privacy interests. The Court had further recognized that a warrant ordinarily is not required when government officials *re*-examine items whose privacy has already been compromised, and it had applied that principle both when the initial incursion on privacy was caused by another government official (see *Andreas*, 463 U.S. at 771-772) and when it was effected by a private actor (see *Jacobsen*, 466 U.S. at 115-120). The Court had also made clear that a factor in the reasonableness of a particular police action is the need to ensure that the police can maintain sufficient control of a scene in order to protect officer safety. Together with the court of appeals decisions that had specifically approved the "consent once removed" doctrine, those decisions of this Court provided ample basis for reasonable officers in petitioners' position to conclude that their conduct was reasonable and thus lawful.

C. The Two-Step Approach Described In *Saucier* Should Not Be Mandatory

In granting certiorari, this Court requested briefing on the question "[w]hether the Court's decision in [*Saucier*] should be overruled." 128 S. Ct. 1702, 1702-1703. Consistent with the position of the government, the defendant officer in *Saucier* was held to have qualified

immunity from suit, see *Saucier*, 533 U.S. at 209, and nothing in this Court's subsequent decisions casts doubt on the correctness of that holding. The *Saucier* Court's general explication of applicable qualified-immunity principles—in particular, its admonition that the qualified-immunity inquiry should focus on the specifics of the defendant officer's conduct, see *id.* at 202, and its recognition that an officer may have qualified immunity even for conduct that is "unreasonable" within the meaning of the Fourth Amendment, see *id.* at 203; pp. 26-27, *infra*—is also sound. There is consequently no reason for this Court to overrule either *Saucier*'s ultimate holding that the suit "should have been dismissed at an early stage in the proceedings," 533 U.S. at 209, or the legal principles that led the Court to that conclusion.

Separate and apart from its application of qualified-immunity principles to the facts of the case, however, the Court in *Saucier* prescribed a two-step analytic method that it stated lower courts "must" follow when a government officer is sued in his personal capacity and asserts a qualified immunity from the suit. See 533 U.S. at 200-201. Under *Saucier*, a lower court must first rule upon "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? *This must be the initial inquiry.*" *Id.* at 201 (emphasis added). Under that framework, a lower court cannot determine whether the constitutional right alleged to have been violated was "clearly established" at the time of the challenged conduct unless the court has first held that an actual constitutional violation was adequately alleged or proved. See *ibid.*

In the view of the United States, the Court should relax the requirement articulated in *Saucier* that lower

courts must adhere in every qualified-immunity case to a specified order of decision. The sequential framework described in *Saucier* will often provide the "better approach" to the resolution of personal-capacity damages suits against individual officers. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 841 n.5 (1998). In other cases, however, the requirement that a court first resolve the constitutional question may entail significant practical costs while providing few countervailing benefits. As is typical when a party to litigation proffers alternative rationales for deciding a case in its favor, the lower courts in this setting should be afforded the same leeway that this Court itself has exercised (see *Brosseau*, 543 U.S. at 198 n.3) to determine that in some circumstances it may be advisable to rule in the defendant officer's favor on the ground that the asserted constitutional right was not clearly established without resolving the constitutional question first.

1. The two-step approach outlined in *Saucier* has its advantages. For example, in many cases, following that approach will provide useful clarification to future courts and to government officials. This Court in *Lewis* explained:

> [T]he generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted. What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain

> uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.

523 U.S. at 841 n.5. For those reasons, the development of constitutional doctrine could be impeded if courts always proceeded directly to the question whether the constitutional right asserted by the plaintiff had been clearly established at the time of the challenged conduct, without first determining whether that conduct actually violated the Constitution.[1]

The value of clarifying the applicable law is greatest when the constitutional question is one of general application and recurring importance. Here, for example, the constitutionality of petitioners' conduct turns on the general question whether the "consent once removed" doctrine provides a valid basis for the warrantless entry of additional officers after an initial consensual entry by an undercover agent, not on the factual nuances of this particular case. Resolution of a Fourth Amendment question that turned on a totality-of-the-circumstances analysis, by contrast, would provide less guidance for officers and courts faced with even slightly different factual scenarios. And while the Court in *Saucier* required both "the district courts and courts of appeals" to

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[1] In some areas of the law, constitutional questions that are not resolved in the context of Section 1983 or *Bivens* actions may be adjudicated in other proceedings, such as a motion in a criminal case to suppress evidence that is alleged to have been unconstitutionally seized. In other areas, however, such as excessive-force cases under the Fourth Amendment, Section 1983 or *Bivens* actions may provide the only realistic avenue of fashioning clear constitutional rules for officers in the field. See, *e.g.*, *Scott*, 127 S. Ct. at 1774-1779; *Graham* v. *Connor*, 490 U.S. 386, 392-399 (1989); Pet. Br. 58-59.

follow the sequential approach described above, 533 U.S. at 207, decisions by courts of appeals have a greater potential to clarify the applicable law, since they establish binding precedent throughout the circuit, and decisions of this Court of course have nationwide effect.

In Fourth Amendment cases, the approach described in *Saucier* may have an additional advantage. This Court has repeatedly recognized that a search or seizure may violate the Fourth Amendment, yet still manifest the "objective legal reasonableness," *Harlow*, 457 U.S. at 819, that is the prerequisite for qualified immunity. See, *e.g.*, *Saucier*, 533 U.S. at 203; *Anderson*, 483 U.S. at 643-644. Based on the fact that "the Fourth Amendment's guarantees have been expressed in terms of 'unreasonable' searches and seizures," some plaintiffs have argued that qualified immunity is categorically unavailable in cases involving Fourth Amendment violations, on the theory that an officer cannot "reasonably" engage in conduct that is "unreasonable" within the meaning of that Amendment. *Id.* at 643. In rejecting that contention, the Court in *Anderson* noted the frequent "difficulty of determining whether particular searches or seizures comport with the Fourth Amendment," and explained that "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officers making analogous determinations in other areas of law." *Id.* at 644.

If courts in personal-capacity suits alleging Fourth Amendment violations routinely began by inquiring whether the defendant officer's alleged conduct manifested "objective legal reasonableness" within the meaning of *Harlow*, the risk of conflating the qualified-immu-

nity determination with the governing Fourth Amendment standard would be exacerbated. Indeed, even in the wake of *Anderson*, courts have had difficulties in providing the requisite degree of protection to officers making difficult, on-the-spot judgments about the reasonableness of particular actions in the midst of rapidly unfolding events. See, *e.g.*, *Boyce* v. *Fernandes*, 77 F.3d 946, 948 (7th Cir. 1996) (describing as a "surprising suggestion" the contention that arresting officers may be entitled to qualified immunity if they mistakenly conclude that they have probable cause to arrest); *Mahoney* v. *Kesery*, 976 F.2d 1054, 1057-1058 (7th Cir. 1992) (similar); see also *Anderson*, 483 U.S. at 643-644. Without the discipline fostered by the two-step inquiry, defendant officers may be subjected to an increased risk of personal liability for conduct that, though unconstitutional, did not violate any appropriately-particularized prohibition that was clearly established at the time the conduct occurred. By contrast, use of the sequential approach described in *Saucier* ensures that courts will treat the two forms of "reasonableness" as distinct and that the important interests protected by the qualified-immunity doctrine will be served.

2. Categorical adherence to *Saucier*'s two-step framework, however, has its disadvantages as well.

a. A requirement that the reviewing court must decide the constitutional question first cuts against the settled principle that courts should ordinarily *refrain* from resolving constitutional questions unless their resolution is necessary to the disposition of the case. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Slack* v. *McDaniel*, 529 U.S. 473, 485 (2000) (explaining that "[t]he *Ashwander* rule should inform the court's discretion in" choosing between po-

tentially dispositive constitutional and non-constitutional threshold grounds for decision); cf. *PDK Labs. Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (stating that "the cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more"). Indeed, in two roughly analogous settings, where a private party's ultimate entitlement to relief depends on a showing that his clearly established constitutional rights were violated, this Court has declined to require lower courts to determine whether a constitutional violation occurred.

In *Lockyer* v. *Andrade*, 538 U.S. 63 (2003), the Court applied the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which provides that a state prisoner is entitled to federal habeas corpus relief only if the state court's rejection of his claim was inconsistent with "clearly established Federal law." 28 U.S.C. 2254(d)(1); see *Andrade*, 538 U.S. at 70-71. This Court rejected the Ninth Circuit's conclusion that federal habeas courts must "review the state court decision *de novo* before applying the AEDPA standard of review," explaining that "AEDPA does not require a federal habeas court to adopt any one methodology" in determining a habeas petitioner's entitlement to relief. *Id.* at 71. In *Andrade*, the Court "d[id] not reach the question whether the state court erred," *ibid.*, concluding instead that the prisoner was not entitled to relief because any error the state court might have committed did not involve an unreasonable application of this Court's clearly established law, see *id.* at 73-77.

The Court approved a similar approach in *United States* v. *Leon*, 468 U.S. 897 (1984). The Court in *Leon* held that evidence seized pursuant to a judicial warrant

should not be suppressed unless the warrant or the affidavit on which it was based was so clearly defective that the officers who executed the warrant could not reasonably have relied upon it. *Id.* at 922-923. The Court further explained that lower courts, in ruling on motions to suppress evidence seized pursuant to allegedly invalid warrants, have "considerable discretion" *either* to "guide future action by law enforcement officers and magistrates" by deciding the substantive Fourth Amendment question "before turning to the good-faith issue," *or* to "reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith." *Id.* at 924-925. Thus, while the Court recognized the systemic interest in clarifying applicable Fourth Amendment doctrine, it treated that interest as a significant factor for courts to consider in choosing the appropriate analytic approach in a particular case, not as a basis for mandating an inflexible order of decision governing *all* cases in which the government invokes the good-faith exception to the exclusionary rule.

For two reasons, the *Leon* Court's discussion of the alternatives legitimately open to courts adjudicating suppression motions is particularly relevant to the soundness of the rule announced in *Saucier*. First, the Court in *Leon* relied in part on this Court's "cases addressing questions of good-faith immunity under 42 U.S.C. § 1983," 468 U.S. at 924, and in particular (see *ibid.*) on *Procunier* v. *Navarette*, 434 U.S. 555, 566 n.14 (1978). In *Procunier*, this Court declined to decide whether the plaintiffs had suffered a violation of constitutional rights because it determined that the defendant officers were in any event entitled to qualified immunity from the suit. See *ibid.* Second, this Court has equated

the two forms of objective good faith, holding that "the same standard of objective reasonableness that [the Court] applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer" who is sued for an alleged violation of Fourth Amendment rights. *Malley*, 475 U.S. at 344 (citation omitted); see *Groh*, 540 U.S. at 565 n.8.

More generally, treatment of the two-step *Saucier* framework as mandatory runs counter to the usual rule that courts possess broad discretion in choosing among potentially dispositive grounds for decision. When a party to litigation asserts two distinct legal arguments, either of which if accepted would provide an independent basis for entry of judgment in the party's favor, the court ordinarily has broad latitude to decide the case on either ground without resolving the merits of the alternative argument. To be sure, there are exceptions to that principle, see, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998) (explaining that a federal court ordinarily must address jurisdiction first), but the norm is to accord lower courts leeway in determining how to resolve the cases before them in the most efficient and prudent manner.

b. In addition, when a lower court in a personal-capacity suit holds that the defendant officer's conduct was unconstitutional but that qualified immunity precludes an award of damages, the court's constitutional holding may be rendered effectively unappealable. See, *e.g.*, *Lyons* v. *City of Xenia*, 417 F.3d 565, 582 (6th Cir. 2005) (Sutton, J., concurring); cf. *Bunting* v. *Mellen*, 541 U.S. 1019, 1023-1025 (2004) (Scalia, J., dissenting from denial of certiorari). A lower court decision that establishes rules of official conduct going forward may thus be insulated from further appellate scrutiny, even if the court's

constitutional ruling is entirely unsound. As Judge Sutton has observed, "[b]y multiplying constitutional holdings that are not subject to review in the normal course, a rigid application of the two-step inquiry may do as much to unsettle the law as to settle it." *Lyons*, 417 F.3d at 582 (Sutton, J., concurring).

Rigid application of the *Saucier* framework may impose an unnecessary burden on the judicial system as well. An inflexible application of the two-step approach requires the reviewing court to decide the constitutional issue as an initial matter even if resolution of that question is difficult and time-consuming, even if members of an appellate panel are divided about its proper resolution, and even if the court's disposition of the issue turns on idiosyncratic, case-specific factors so that its opinion provides little guidance for future disputes. See *Lyons*, 417 F.3d at 582 (Sutton, J., concurring). The judicial system must incur those costs, moreover, even if the very difficulty of the constitutional issue makes it readily apparent that the constitutional right asserted by the plaintiff was not "clearly established" at the time of the challenged conduct.

To be sure, the concerns described above will not always outweigh the interests (see pp. 24-27, *supra*) that support initial resolution of the constitutional issue. Those concerns are sufficiently powerful, however, to support a modification of the *Saucier* analysis to permit courts to consider the costs of deciding the constitutional question first in circumstances where the qualified immunity issue may be clear-cut. See *Lyons*, 417 F.3d at 583 (Sutton, J., concurring) (explaining that the appropriate objective in this setting "is not to *maximize* the number of constitutional rulings but to *optimize* constitutional rulings, as traded off against essential admin-

istrative values, such as the accurate, efficient and timely resolution of cases in the federal courts").

c. Indeed, this Court itself has deviated from the two-step approach in the summary-reversal context where it was clear that the defendant officers were entitled to qualified immunity. In *Brosseau*, the court of appeals held that the defendant officer had utilized excessive force in violation of the Fourth Amendment, and that the right that had been violated was clearly established at the time of the challenged conduct. 543 U.S. at 195. This Court "express[ed] no view as to the correctness of the Court of Appeals' decision on the constitutional question itself," *id.* at 198, but summarily reversed the court of appeals' determination that the conduct at issue violated the plaintiff's clearly established rights, *id.* at 198-201. The Court stated that it "ha[d] no occasion to reconsider [its] instruction in *Saucier* that lower courts decide the constitutional question prior to deciding the qualified immunity question." *Id.* at 198 n.3 (citation omitted). But there is no compelling reason why the lower courts should be denied the flexibility this Court has exercised in qualified-immunity cases to proceed directly to the question whether the constitutional right alleged to have been violated was "clearly established" at the time of the challenged conduct.[2]

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[2] This Court in *Brosseau* explained that it was "exercis[ing] [its] summary reversal procedure" in order "to correct a clear misapprehension of the qualified immunity standard." 543 U.S. at 198 n.3. As that statement indicates, cases will at least occasionally arise in which the applicable qualified-immunity standard is in greater need of clarification than is the substantive constitutional rule. Thus, even if the only factor relevant to the choice of an appropriate order of decision were the interest in clarifying the law on a going-forward basis, it would not follow that the constitutional issue should always be addressed first.

3. Even if the *Saucier* two-step framework is not treated as mandatory, several considerations suggest that this Court should resolve the Fourth Amendment question presented here. First, the court of appeals has already decided that issue, and its decision is in conflict with the precedents of other circuits. Relatedly, the Court has granted certiorari on the question, and the issue has been briefed by the parties. In these circumstances, the Court's guidance on the constitutional question is warranted.

Second, because the constitutional question is one of general application, rather than one in which "the result depends very much on the facts of each case," *Brosseau*, 543 U.S. at 201, this Court's resolution of the issue would provide meaningful guidance for officers conducting future undercover operations and for courts resolving future challenges to such operations. And third, because this Court's resolution of the Fourth Amendment question would represent the final word on the issue in any event, the case does not currently raise the concern (see pp. 30-31, *supra*) that the existence of qualified immunity might foreclose further appeal of a constitutional ruling. Alternatively, if the Court declines to resolve the Fourth Amendment question, or if it holds that petitioners' entry into respondent's house was unconstitutional, petitioners are entitled to qualified immunity because respondent has not shown a violation of any constitutional right that was "clearly established" at the time of the challenged conduct.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CORDELL PEARSON, *et al.*,

Petitioners,

—v.—

AFTON CALLAHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE ACLU IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. Since its founding in 1920, the protection of Fourth Amendment rights and the vindication of constitutional rights more generally have been a central concern of the ACLU, which has appeared before this Court in numerous Fourth Amendment and qualified-immunity cases, both as direct counsel and as *amicus curiae*. Because this case addresses important questions concerning both the Fourth Amendment and the ability to assert viable constitutional claims, proper resolution of the Fourth Amendment and qualified-immunity issues is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

The Central Utah Narcotics Task Force arrested Brian Bartholomew in January 2002 for controlled-substances violations. JA 48. In exchange for

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

leniency, he agreed to become an informant for the Task Force. JA 49.

On March 19, 2002, Bartholomew asked an acquaintance, Respondent Afton Callahan, whether he had any drugs for sale. JA 140. Respondent said he was going to acquire methamphetamine from a third person later that day, and that Bartholomew could in turn purchase the drugs from him. JA 114, 140. After drinking six to eight beers, Bartholomew went to Respondent's home and confirmed that Respondent had indeed procured the drugs. JA 115-18. While there, Bartholomew ingested methamphetamine. JA 166-67, 171.

Bartholomew then drove to meet a Task Force officer, Jeffrey Whatcott, and told him that Respondent was prepared to sell drugs. The Task Force gave Bartholomew a $100 bill to purchase methamphetamine, equipped him with a transmitter, and drove him to a site near Respondent's home. JA 54-55, 184, 243-44. Bartholomew then walked the rest of the way to the residence. JA 185.

Bartholomew entered Respondent's home and exchanged the $100 bill for methamphetamine. JA 64, 123, 125, 186. Although the Task Force officers who were waiting outside the home could not hear the entire transaction or account for everyone in the home, they did hear Bartholomew give what they believed to be a prearranged signal, after which they entered the residence and arrested Respondent and two other men who were present. JA 64-65, 79, 244-45, 265-66.

Throughout the transaction, the officers did not fear for the safety of Bartholomew or anyone else in the home. Nor did they profess any concern that the occupants of the residence would dispose of the drugs in an attempt to hide the contraband. Yet, they made no attempt to obtain an arrest warrant. JA 89-90.

Respondent was charged with methamphetamine possession and distribution, among other offenses. JA 314-16. Before trial he moved to suppress the evidence seized in his home and dismiss the charges because the officers unconstitutionally entered his home without a warrant. During trial Respondent renewed the motion, which the court denied JA 295-96, 301-02.

After the close of evidence but before the case was submitted to the jury, Respondent pled guilty to distribution of methamphetamine, conditioned upon the State dismissing the remaining charges and allowing Respondent to appeal the denial of his suppression motion. JA 303-04. On appeal, the Utah Court of Appeals concluded that the warrantless entry violated the Fourth Amendment. It reversed the conviction and remanded the case with directions to grant Respondent's motion to suppress. JA 334-39. The trial court then granted Respondent's motion and dismissed the charges against him.

Respondent commenced this civil action in federal district court, seeking damages for the violation of the Fourth Amendment's warrant requirement. JA 340-54. The district court granted Petitioners' motion for summary judgment on

Respondent's claims under 42 U.S.C. § 1983. Pet. App. 30.

Respondent appealed, and the Tenth Circuit reversed the district court's order. The court of appeals rejected the extension of the "consent-once-removed" doctrine to citizen informants—as contrasted to undercover police officers—holding that the officers' warrantless entry violated Callahan's constitutional rights. It further held that those rights were clearly established at the time of the search, since the only recognized exceptions to the Fourth Amendment's warrant requirement did not permit police officers to enter a home without a warrant based on an informant's participation in a drug transaction within the residence. Pet. App. 1.

SUMMARY OF ARGUMENT

1. Searches and seizures inside a home without a warrant are presumptively unreasonable. Even when police officers have probable cause to believe a crime is occurring inside a suspect's home, absent exigency or other limited exceptions not applicable here, they must obtain a warrant before entering to arrest or search. Though Petitioners attempt to cloak the search here in the mantle of "consent," in fact they urge this Court significantly to expand the established parameters of the jealously and carefully drawn consent exception to the warrant requirement.

The consent-once-removed doctrine rests on a legal fiction developed for undercover police officers. But the decision to apply it to undercover police officers cannot be separated from the special status

the police occupy in our criminal justice system. Police officers are deemed to share collective knowledge about their investigations. They are expected to act in good faith. They are expected to exercise good judgment, based on extensive training and experience, about whether probable cause exists. They are expected to be truthful. They are expected to act safely and not to endanger others recklessly.

Informants, on the other hand, are not trained police officers. To the contrary, the vast majority of informants are criminals promised leniency if they provide incriminating information. They are assumed to have selfish motivations. They have a proven track record of unreliability. Their willingness to falsely accuse others in order to curry favor with the police has been thoroughly documented by both case law and academic studies. Informants are not sworn to uphold the law. Even when acting as agents of the police, they are not provided any special law enforcement powers or authority beyond those possessed by ordinary citizens and bystander-witnesses. They are not trained to recognize dangerous situations, into which officers too often step when they enter a home without a warrant upon the word of an informant.

The police already have ample tools under existing law to respond to any exigent circumstances that may arise during a drug enforcement operation, including the potential use of anticipatory warrants, without the need to create a new exception to the warrant requirement. The surprise forced entry of a home to make an arrest is one of the most dangerous of all interactions between police and citizens, often leading to tragic consequences. Extending the

consent-once-removed doctrine as urged by Petitioners will entrust too much of this crucial decision-making process to criminals turned informants.

2. The Court has also instructed the parties to brief whether *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled. We believe it should not. The problem that *Saucier* was designed to address has not disappeared. Qualified immunity is intended to shield public officials from personal liability if the law they are alleged to have violated was not clearly established at the time that they acted. But granting qualified immunity on that basis alone, without also clarifying what the law in fact requires, perpetuates a state of legal ambiguity that has two unfortunate consequences. First, it makes it more difficult for conscientious public officials to conform their behavior to the law. Second, it diminishes the likelihood that future plaintiffs will be compensated for the constitutional injuries they suffer. *Saucier* therefore directs courts to clarify the relevant constitutional rule before deciding whether it was clearly established.

When followed, this two-step process has achieved its stated purpose. Assertions that it violates the rule against advisory opinions or is inconsistent with the doctrine of constitutional avoidance have already been considered and properly rejected by this Court. The various exceptions that critics now urge to the *Saucier* rule, including a wholesale exception in Fourth Amendment cases, would effectively restore the law of qualified immunity to the unsatisfactory state that existed prior to *Saucier*. At a minimum, any relaxation of

the *Saucier* rule should be limited to narrowly defined circumstances that will maintain the essential holding of *Saucier* in most cases. For example, the law-clarifying function of *Saucier* might not be undermined if its sequencing requirements were relaxed when the constitutional claim presented in the case turns on an unresolved question of state law.

ARGUMENT

I. THIS COURT SHOULD NOT ADOPT THE CONSENT-ONCE-REMOVED DOCTRINE TO VALIDATE A WARRANTLESS ENTRY UNDERTAKEN AT THE PROMPTING OF AN UNTRAINED, UNSWORN, AND UNRELIABLE INFORMANT

A. Warrantless Entry Of The Home Is Presumptively Unreasonable, And The Limited Exceptions To The Warrant Requirement Must Serve "Compelling" Law-Enforcement Needs

The "chief evil" that the Fourth Amendment proscribes is the government's warrantless entry of the home. *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972); *see also, e.g., Payton v. New York*, 445 U.S. 573, 586 (1980) (holding that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest). Searches and seizures inside a home without a warrant are presumptively unreasonable. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The ultimate sanctuary for privacy, the home is the last

place where an individual expects to confront the State, and, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). New exceptions to the warrant requirement are recognized only when necessary to serve "compelling" law enforcement needs. *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). Petitioners thus have the "burden . . . to show the existence of such an exceptional situation as to justify creating a new exception to the warrant requirement." *Id.* at 391-392.

B. No Compelling Law Enforcement Need Justifies Adoption of the Consent-Once-Removed Exception for Informants

The consent exception to the warrant requirement is "jealously and carefully drawn." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)). As Justice Stevens noted in his concurring opinion in *Randolph*:

> At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a "house" or "castle" unless authorized to do so by a valid warrant. *See Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B.). Every occupant of the home has a right—protected by the common law for centuries and by the Fourth Amendment since 1791—to refuse

> entry. When an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right.

Id. at 123-124 (Stevens, J., concurring).

A new doctrine significantly expanding the consent exception to the warrant requirement should not be constructed on the shaky foundation of notoriously unreliable criminals-turned-informants. Nor should such a significant new exception to the warrant requirement be created when, as here, established law provides police with ample flexibility to respond to exigent circumstances and to the special requirements of undercover drug enforcement operations.

Police may already enter homes in hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to prevent a suspect's escape, or when police officers or other people inside or outside the home are in danger. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). Moreover, as Petitioners acknowledge, police using an informant to elicit illegal information or behavior that police expect to provide probable cause may obtain an anticipatory warrant. "The anticipatory search warrant presumably would be triggered when the informant gives the signal; at that point the officers would enter the home under the warrant." Pet. Br. 32-33, citing *United States v. Grubbs*, 547 U.S. 90 (2006).

C. Occupants Do Not Abandon Their Expectation Of Privacy Simply By Engaging In Illegal Activity In The Home, Even In The Presence Of Others

The core of Petitioners' argument is that police may enter a suspect's home without a warrant if the suspect has consented to the entry of an undercover informant in front of whom he then engages in illegal activity. Petitioners suggest this is so because the suspect has, under such circumstances, surrendered all expectation of privacy in the home. Pet. Br. 17. This Court has rejected previous attempts to bootstrap illegal activity into a forfeiture of Fourth Amendment rights. In *Mincey v. Arizona*, the State argued that by shooting a police officer the suspect had "forfeited any reasonable expectation of privacy in his apartment." 437 U.S. at 391. This Court forcefully rejected the argument, noting that "this reasoning would impermissibly convict the suspect even before the evidence against him was gathered." *Id.* Similarly, in *Michigan v. Tyler*, 436 U.S. 499, 505-06 (1978), this Court rejected the argument that by committing arson a defendant had abandoned any expectation of privacy in the burned home. "It is, of course, impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." *See also Kyllo*, 533 U.S. 27 (warrant required to conduct search of home, even where officers received reliable information that specific and illegal commercial activity was transpiring within the home); *United States v. Karo*, 468 U.S.

705 (1984) (warrant required to monitor electronic pager in home, even though the home was used for commercial cocaine distribution). *See generally Payton*, 445 U.S. at 587-88 ("[A]bsent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.")

Nor is the expectation of privacy fatally compromised merely by the presence of another person invited into the home who observes illegal activity. This is illustrated by the following hypothetical: If Respondent had invited a neighbor into his home and then engaged in illegal activity in the neighbor's presence, the neighbor would be deemed an ordinary bystander-witness to a crime. If the neighbor had called police from inside the home and reported the ongoing illegal activity, police would, absent exigency, have been required to obtain a warrant to enter the home to search or arrest. Even if the neighbor's report were enough to constitute probable cause, a warrant would still be necessary. *See, e.g., United States v. McCraw*, 920 F.2d 224 (4th Cir. 1990) (corroborated tip from witness involved in drug transaction created probable cause, but warrantless home entry violated *Payton*); *United States v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986) (although statements from witnesses, combined with other evidence, created probable cause, warrantless entry violated *Payton*); *United States v. Charles*, 290 F. Supp. 2d 610 (D.V.I. 1999) (information from tipster, corroborated by officers, constituted probable cause, but warrantless

entry without exigent circumstances contravened Fourth Amendment).

Consent-once-removed, then, cannot validate a warrantless entry whenever a suspect consents to someone entering his home and then engages in illegal activity; for purposes of the warrant requirement, the *status* of the person to whom the illegal activity is revealed matters.

D. The Rationale For Applying The Consent-Once-Removed Doctrine to Undercover Police Officers, Even If Valid, Does Not Apply To Unreliable And Untrained Informants

Amicus assumes for the sake of argument that if Bartholomew had been an undercover police officer, Respondent's voluntary relinquishment of his privacy—i.e. consent—could constitutionally be deemed "transferred" to other officers waiting outside. The central question presented by this case is whether a non-police-officer undercover informant ought to be treated the same as a police officer for purposes of transferring consent in this manner. Petitioners assert that the answer is yes, because "[a]n agent of the state is an agent of the state, regardless of whether that agent is working with the government pursuant to an informant contract or an employment contract." Pet. Br. 38. However, the cases petitioners cite for this sweeping proposition are inapposite. None involved a warrantless entry by police officers based upon previous consent given to a non-police-officer informant. *Hoffa v. United States*, 385 U.S. 293 (1966), *Lewis v. United States*, 385 U.S. 206 (1966), *United States v. Miller*, 425 U.S.

435, 443 (1976), and *United States v. White*, 401 U.S. 745, 752 (1971). All involve the conceptually distinct question whether evidence and information voluntarily provided by defendants to undercover informants is admissible at trial. Petitioners' argument suggests that the *Hoffa* line of cases should be expanded to permit police to *raid* a home *without a warrant* the moment the informant has elicited incriminating evidence. The implications of that argument for the Fourth Amendment's protection of the home are staggering—and dangerous, not only to citizens' privacy expectations, but also to public safety.

This Court should reject Petitioners' agency argument. The Government is not deemed categorically liable for all actions of its non-police-officer informants. *See, e.g., Ghandi v. Police Dept. of City of Detroit*, 823 F.2d 959, 963-964 (6th Cir. 1987) (no *per se* agency rule). Similarly, this Court should not categorically deem all informants equivalent to police officers for purposes of applying the consent-once-removed doctrine. The question of whether an informant should be treated like a police officer for purposes of the consent-once-removed doctrine cannot be answered simply by asserting that the informant was acting as a state agent. Instead, the Court should look behind the state agent label to the reasons consent might properly be transferred from one police officer to others, and determine whether those reasons are equally applicable to informants.

1. Informants Cannot Be Deemed To Share "Collective Knowledge" With Police Officers

The concept of "collective knowledge" has been used to justify the consent-once-removed doctrine where an undercover police officer invited inside the home gains probable cause to arrest and then summons other officers waiting outside. *See United States v. Yoon*, 398 F.3d 802, 812-13 (Gilman, J., dissenting). Courts routinely impute collective knowledge regarding criminal investigations to law-enforcement officers. *See, e.g., Illinois v. Andreas*, 463 U.S. 765, 771 n.5 (1983); *United States v. Blair*, 524 F.3d 740, 751 (6th Cir. 2008); *United States v. Banks*, 514 F.3d 769, 776 (8th Cir. 2008). To extend the collective-knowledge rationale to the relationship between informants and police officers, however, would ignore the lack of information sharing between informants and officers, the mutual skepticism with which the two groups view each other, and widespread deceit by informants.

Law enforcement officials' willingness to freely exchange information among each other is conspicuously absent with informants. *See, e.g.*, Stephen S. Trott, Lecture on the Use of a Criminal As a Witness: A Special Problem 23 (Oct. 2007), *at* http://72.3.233.244/pdfs/drugpolicy/informant_trott_outline.pdf (advising prosecutors to "not let down your guard and share the kind of information with [an informant] you might share with a friend or colleague"). Police officers do not freely share information with ordinary bystander-witnesses, and their reticence is even more pronounced with informants.

Police mistrust of informants is well-placed. Informants are notoriously unreliable. *See, e.g.*, Report of the 1989-90 Los Angeles County Grand Jury 16 (1990) (reporting "repeated instances of [informants committing] perjury and providing false information to law enforcement," even when under oath), *cited in United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107 (2006). Many informants, including Mr. Bartholomew, have considerable criminal records and face the prospect of additional criminal charges. Informants have every reason to curry favor with law-enforcement officers by telling the officers what they would like to hear. *See, e.g.*, Mark Curriden, *The Informant Trap: Secret Threat to Justice*, Nat'l L.J., Feb. 20, 1995, at A1 (quoting Judge Stephen Trott as explaining that informants will lie, commit perjury, and manufacture evidence in order to "get out of trouble with the law"). Some, like Mr. Bartholomew, are under the influence of alcohol or other drugs at the time that they provide information to law-enforcement officers, further undermining their reliability. *See* JA 118-19, 166-67, 171 (noting that Bartholomew had consumed six to eight beers and ingested methamphetamine prior to engaging in the drug transaction with Respondent). It is no wonder that federal jury instructions, including the pattern jury instruction on informants, often warn jurors to review informant testimony with "greater care" because informants have a "motive to falsify." Edward J. Devitt et al., *Federal Jury Practice and Instructions* 476-509 (4th ed. 1992).

A study about informants conducted by the *Pittsburgh Post-Gazette* found: "The reporters discovered so many examples of lying informants that they concluded, 'Perjury has become the coin of the realm in federal law enforcement. People's homes are invaded because of lies. People are arrested because of lies. People go to prison because of lies.'" Jim Redden, Snitch Culture: How Citizens Are Turned into the Eyes and Ears of the State 23 (2000) (quoting Bill Moushey, *Win At All Costs: Calculated Abuses*, Pittsburgh Post-Gazette, Dec. 7, 1998). It is by now a sad, well-recognized fact that informants commonly falsify accusations and other evidence. *See generally* Editorial, *The Informant Trap*, Nat 'l L.J., Mar. 6, 1995, at A18 ("Informants increasingly will do anything—lie, entrap, fabricate evidence—to win their freedom . . . ."); Natapoff, *supra*; *United States v. Calandrella*, 605 F.2d 236, 246 (6th Cir. 1979) ("The danger of [a law enforcement official's] having falsified his information is simply not as great as with an unnamed criminal informer who may be seeking favorable treatment from the government or revenge against the suspect.").[2]

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[2] This is true even when the informant is "wired." *See, e.g.*, Mark Curriden, The Informant Trap: Postal Agents Stamped By Scandal, Nat'l L.J., Feb. 27, 1995, at A1. Postal inspectors "wired" informants and sent them to conduct specific drug transactions, which the informants purportedly recorded on cassettes that they subsequently provided to the inspectors. *Id.* However, the informants did not in fact consummate a drug transaction, and instead recorded a feigned transaction with their friends, who impersonated the targets of the investigation. *Id.* Similar circumstances have led to false arrests in Boston, Chicago, Indianapolis, Los Angeles, Minneapolis, Toledo, and

The justifications for imputing collective knowledge among police officers are simply not applicable to informants.

2. Informants Lack The Training, Judgment And Trustworthiness Of Undercover Law Enforcement Officers

Informants differ in other ways relevant to whether they should be treated like police officers for purposes of the consent-once-removed doctrine. With a demonstrated history of false accusations and other outright lies, informants cannot be analogized to sworn police officers when assessing whether to accept their assertions that a home's occupant consented to their entry, or whether to treat their accusations as sufficient to circumvent the warrant requirement. Informants usually have criminal convictions or charges pending against them and for good reasons are not entrusted with the considerable authority granted to police officers. Informants, after all, find themselves in their position not because the government believes they can reliably enforce the law, but often for precisely the opposite reason: they have previously violated the law.

Moreover, informants undergo none of the training that law-enforcement officers receive and thus are typically unschooled in the law and law enforcement techniques. Police officers receive extensive instruction and pass rigorous tests. They

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West Palm Beach. *Id.* Moreover, as demonstrated in this case, law-enforcement officers often cannot hear much of the conversation through a transmitting or recording device, leading the officers to speculate about the activities of the informant and others. *See* JA 64-65, 79.

must complete field and classroom trainings, as well as satisfy background checks, prior to taking their oath of office. After their training, officers are vested with enormous power and discretion. The State provides them with a firearm and handcuffs, grants them access to otherwise private databases to aid in criminal investigations, and presents them with a badge and uniform. Officers have the ability—sometimes the obligation—to execute warrants, pursue suspects in high-speed chases, use weapons and in some circumstances lethal force against citizens. Not surprisingly, the State accords none of these powers to informants.

The dissent below—like other courts that have applied the consent-once-removed doctrine when informants are invited into a home—does point to one law-enforcement-like power that informants possess in the State of Utah: the authority to effectuate a "citizen's arrest." 494 F.3d at 902. *But see Yoon*, 398 F.3d at 814 (Gilman, J., dissenting) (noting courts' "unwarranted assertion" that a citizen-arrest power could "give the police permission to burst into the home without a warrant in order to assist in the arrest"). But the citizen's-arrest authority is just that: a power that *all* citizens possess. *See* Utah Code Ann. § 77-7-3 (2008). Police receiving a phone call from a citizen who had just witnessed a crime in someone else's home would need either exigent circumstances or a warrant to enter that home, even if entering to "assist" that citizen in effecting a citizen's arrest. The same must be true of a informant. The ability to effectuate a citizen's arrest does not distinguish the informant from any other citizen or bystander-witness.

3. The Demonstrated Dangerousness Of Police Reliance On Informants Counsels Against Establishing A New Exception To The Warrant Requirement Grounded On Such Reliance.

"The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963). The warrant requirement is especially critical to protect the public from the tragic consequences that can result from surprised forced entries into the home. An informant working for the police to reduce his own criminal liability has a strong incentive to deliver arrests to his police handlers and, thus, to encourage the police to enter and search if the informant believes drugs may be in a house. This strong self-interest, coupled with a lack of training in the technicalities of probable cause jurisprudence, make an informant much more likely to lie, or simply to err on the side of prematurely or incorrectly signaling police to enter a suspect's home to search for drugs.

Even without the consent-once-removed exception to the warrant requirement, examples abound of tragic consequences resulting from police raiding houses with warrants obtained in reliance on informants. *See generally* Radley Balko, Cato Inst., The Rise of Paramilitary Raids in America (2006).

Removing judicial oversight and encouraging *warrantless* raids on the word of informants will only increase the already significant public harms associated with undercover informants, illustrated by the following examples:

a. Armed with an inaccurate statement from an informant that drugs were being dealt from Ana Roman's New York City home, police officers stormed the house in 1996 and found nothing more than 70-year-old Ana, her husband, and their adult son. Ana's husband had a heart attack upon seeing the officers' assault rifles trained on them, and died shortly thereafter of heart failure. *Id.* at 48.

b. An informant gave Boston police incorrect information, leading to a 1994 SWAT team raid of the apartment of Rev. Accelyne Williams, a 75-year-old retired minister. He died of a heart attack after the police raided his home. *Id.* at 22.

c. Jerome County, Idaho, sheriff's deputies James Moulson and Philip Anderson are among the many police officers who have died due to informant malfeasance. Acting on an informant's accusation that George Timothy Williams was one of the nation's largest distributors of marijuana, officers raided Williams' home one evening in 2001 to arrest him. A gunfight ensued, killing Moulson, Anderson and Williams. Only later was it revealed that the informant had fabricated the story and that the house contained less than four grams of marijuana. *Id.* at 69.

d.. What the police later described as "miscommunication with an informant" led to a raid on the Bronx home of Ellis Elliot in 1998. When they

broke down his door, Elliot thought he was being attacked and fired his gun. The police fired back, missing him, but apparently fearing for their safety dragged him naked out of his home. Police later admitted their error. *Id.* at 45-46.

e. In May 1999, police stormed the Durham, North Carolina, home of 73-year-old Catherine Capps. Police say they obtained a warrant for the home after a informant bought crack cocaine there. Capps had poor vision, was deaf, and according to her family, "could not even cook an egg without being extremely out of breath." Capps later died from health maladies her family says she incurred during the raid. She was never charged. *Id.* at 59-60.

Given these dangers, this Court should decline Petitioners' invitation to expand the "jealously and carefully drawn" consent exception to the warrant requirement, which would only encourage even more police reliance upon, and less judicial oversight of, informants.

II. *SAUCIER'S* TWO-STEP RULE FOR RESOLVING QUALIFIED IMMUNITY CLAIMS IS CRITICAL FOR CLARIFYING CONSTITUTIONAL RIGHTS AND SHOULD BE RETAINED

The two-step rule announced in *Saucier* was not developed in a vacuum. Rather, it responded to a troubling pattern that had developed in addressing qualified immunity claims. With disturbing frequency, such claims were upheld on the basis that the defendant's conduct did not violate a clearly

established right without determining whether any rights had actually been violated.

This unresolved ambiguity produced two unfortunate results. First, it failed to provide government officials with the legal guidance they need, and ideally should want, to perform their duties in a constitutional manner. Second, by perpetuating a state of legal ambiguity, it diminished the chance that victims of unconstitutional state action could recover damages for their injury in subsequent actions.

Saucier remedied both problems by insisting that courts presented with a qualified immunity claim initially determine if there has been a constitutional violation on the facts alleged before deciding whether that right was clearly established. The admonitory language of *Saucier* followed the Court's earlier, hortatory observation that it was generally "desirab[le]" to resolve the constitutional question first when ruling on qualified immunity. *See Siegert v. Gilley*, 500 U.S. 226, 233 (1991).

Although *Saucier* has been criticized as inflexible, it has largely accomplished its intended purpose. In our view, therefore, its "essential holding . . . should be retained and once again reaffirmed." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-46 (1992)(joint opinion). If this Court decides to modify *Saucier*, any exceptions to its rule should be carefully defined and narrowly circumscribed.

A. *Saucier* Serves Important Goals That Should Not Be Abandoned

By having courts decide what the law requires before deciding whether that requirement was clearly established at the time defendants acted, *Saucier* "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Public officials who can reasonably claim that they were uncertain of their legal obligations remain entitled to qualified immunity. But *Saucier* simultaneously ensures that the grant of immunity does not short circuit a salutary "process for the law's elaboration from case to case," *Saucier*, 533 U.S. at 201.

Saucier thus shields public officials from liability from damages when they act in a context where the rules are unclear, while placing them on notice that they will be held accountable for future violations of rights that have been clearly announced. *Saucier thereby* helps to ensure that the qualified immunity inquiry promotes rather than frustrates the deterrent function of § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (stating that "§ 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (explaining that "the deterrence of future

abuses of power by persons acting under color of state law is an important purpose of § 1983").[3]

Returning to a pre-*Saucier* regime would once again transform qualified immunity from a rule that gives officers "one liability-free violation of the Constitution" to a rule that allows for "multiple bites of a constitutionally forbidden fruit." *Garcia by Garcia v. Miera*, 817 F.2d 650, 656 n.8 (10th Cir. 1987) (internal quotation marks omitted), *cert. denied*, 485 U.S. 959 (1988). This is because "[a]n immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional," *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). As a result, unconstitutional conduct could proliferate yet escape review as defendants rely on the absence of clearly established rights to avoid liability. *See Joyce v. Town of Tewksbury*, 112 F.3d 19, 26 (1st Cir. 1997) (Selya, J., dissenting) ("[W]e will be seen as sanctioning that which we are unwilling to condemn."). This ongoing uncertainty will inevitably deter future victims from seeking redress for similar constitutional injuries. *See Owen*, 445 U.S. at 651 n.33 (noting "the deleterious effect of freezing constitutional law in its current state of development" if individuals were to lose incentive to seek vindication of constitutional rights).

To be sure, some constitutional rights can be clarified and become clearly established in contexts

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[3] The same considerations apply here, and elsewhere throughout this brief, to the cognate right to sue federal officials for constitutional torts under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

where qualified immunity does not apply, such as suppression motions, actions for injunctive relief, or suits against municipalities. But, as this Court has recognized, "these avenues would not necessarily be open" to many litigants. *County of Sacramento*, 523 U.S. at 841 n.5. Suppression motions provide a vehicle for clarifying only a narrow subset of constitutional rights relevant to criminal defendants.[4] Injunctive relief may be unavailable because a government policy, no matter how clearly unconstitutional, cannot be enjoined where it is unlikely to be applied to the same person again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (rejecting standing for injunctive relief where plaintiff is not "likely to suffer future injury from the use of chokeholds by police officers"). Sovereign immunity and the Eleventh Amendment prohibit individuals from collecting damages from the federal or state governments directly for constitutional violations. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (extending the Eleventh Amendment to bar suits by citizens against their own states unless the state

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[4] Even then, suppression motions are unavailable in deportation proceedings, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and are unavailing in criminal proceedings if the officer acted in good faith reliance on a judicial warrant, *United States v. Leon*, 468 U.S. 897 (1984). The law-clarifying function of the courts is further undermined if the exclusionary rule is limited because of the theoretical possibility of a damages claim, *see Hudson v. Michigan*, 547 U.S. 586, 597 (2006), and damages claims are limited by the assumption that Fourth Amendment rights can be clarified through a suppression motion. Individuals who have been treated unconstitutionally by the state should not be abandoned between this Scylla and Charybdis.

consents). And, while municipalities are not protected by qualified immunity, *see Owen v. City of Independence*, 445 U.S. 622 (1980), they can only be sued for damages where plaintiffs can prove the existence of an unconstitutional policy or custom. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978).

Damages lawsuits against individual officers are therefore "a key forum for refining constitutional law." Pamela Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 Fordham L. Rev. 1913, 1918-1921 (2007). *See also Butz v. Economou*, 438 U.S. 478, 505-06 (1978) (rejecting the claim of absolute immunity by executive officials and recognizing that a damages action against officials can be an "important means of vindicating constitutional guarantees"). Indeed, a § 1983 damages suit against individuals is often the *only* avenue for clarifying many constitutional rights. *See* Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1560-61 (2007). *See also* U.S. Br. at 25 n.1 (noting that for "excessive-force cases under the Fourth Amendment, Section 1983 or *Bivens* actions may provide the only realistic avenue of fashioning clear constitutional rules for officers in the field").

The United States suggests that this Court should relax *Saucier*'s sequencing requirement because it "runs counter to the usual rule that courts possess broad discretion in choosing among potentially dispositive grounds for decision." U.S. Br. at 30. It is a suggestion that largely disregards history. The Court's dissatisfaction with that approach, and its manifest failure to clarify

important but unresolved constitutional rights, is what led to *Saucier* in the first place.

Even after this Court encouraged (without ordering) an initial determination of the constitutional claim in *Siegert v. Gilley*, 500 U.S. at 232, lower courts frequently granted qualified immunity without resolving the underlying constitutional issue. *See* John M.M. Graebe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 410 n.35 (1999) (finding that courts skipped the constitutional question in 51 of 79 representative qualified immunity cases decided around 1997 in which the defendant won on the immunity issue).[5] In *Wilson v. Layne*, for example, the Court of Appeals had refused to decide the constitutionality of media ride-alongs, 526 U.S. at 608, although such ride-alongs had become "a common police practice," *id.* at 616. Had this Court not intervened and held the practice to be

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[5] The problem was even more severe prior to *Siegert*. *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 Ind. L. Rev. 187, 193-94 (1993) (noting that pre-*Siegert*, "courts could and would avoid deciding the issue of whether particular conduct violated constitutional law," and this "frequently resulted in cases disposed of on qualified immunity grounds, with no resolution of the underlying constitutional claim"); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 53 (1989) (describing pre-*Siegert* cases in which merits bypass resulted in leaving officials "hanging over a constitutional abyss").

unconstitutional, the lower court decision would have left officers free to continue with the practice

Despite the contention of some of its critics, *Saucier* does not violate the rule against advisory opinons. As Justice Scalia explained: "Th[e] constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases." *Bunting v. Mellen,* 541 U.S. 1019, 1023-24 (2004)(Scalia, J., dissenting from the denial of *certiorari*).

Likewise, the doctrine of constitutional avoidance does not dictate a departure from the *Saucier* rule. The doctrine of constitutional avoidance is not jurisdictional but prudential, *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341 (1936)(Brandeis, J., concurring), and "does not readily fit" the qualified immunity context. *County of Sacramento,* 523 U.S. at 841 n.5. Applied to qualified immunity determinations, the doctrine of constitutional avoidance would do more than overrule *Saucier,* it would virtually require courts to proceed immediately to step two – the "clearly established inquiry" – in every instance. That is because "a determination of whether a right is clearly established will *always* require no more, and will often require less, analysis than is required to decide whether the allegedly violated constitutional right actually exists in the first place." *Spivey v. Elliott,* 41 F.3d 1497, 1499 (11th Cir. 1995) (emphasis added). This Court, however, has already considered and rejected that approach. "If the policy

of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *County of Sacramento*, 523 U.S. at 841 n.5.

Finally, critics of *Saucier* argue that the rule is unfair because government defendants who lose on step one but prevail on step two will be left with a constitutional ruling that they are unable to appeal. The force of that concern diminishes on close examination, however, and is ultimately outweighed by the benefits of a clear constitutional ruling, both for the parties and for society as a whole.

As an initial matter, the concern disappears entirely if the plaintiff appeals the qualified immunity decision in defendant's favor since both stages of the *Saucier* inquiry will then be before the reviewing court. *See Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (reviewing the constitutional issue that the plaintiff had won in the lower court); *Vives v. City of New York*, 405 F.3d 115, 123 (2d Cir. 2005) (Cardamone, J., concurring) (noting that "the Supreme Court will have ample opportunity to review our constitutional decision if plaintiff appeals our decision").

Furthermore, the problem will only arise with respect to defendants who seek to appeal a merits determination by the Court of Appeals to this Court. An unappealable district court merits determination does not raise the same problem because district court opinions are not binding precedent and do not

qualify as "clearly established" law for qualified immunity purposes in most circuits. *See Kalka*, 215 F.3d at 100 (Tatel, J., concurring); *see also Thompson v. Keohane*, 516 U.S. 99, 115 n.14 (1995) ("In other contexts, we have similarly concluded that the likely absence of precedential value cuts against requiring plenary appellate review of a district court's determination.").

If this Court wishes to grant *certiorari* to review a constitutional issue that is appealed by the defendant who has prevailed on qualified immunity based on the "clearly established" test, it can invoke an exception to its general practice of denying *certiorari* petitions filed by prevailing parties. *See Bunting*, 541 U.S. at 1023-24 (Scalia, J., dissenting from the denial of *certiorari*). *See also* Nat'l Assoc. of Counties Br. at 28 ("[I]f a merits holding of a lower court threatens to cause substantial disruption of the law, this Court surely remains free to grant review."). Although this Court rarely hears appeals by parties prevailing below, the *certiorari* statute does not preclude the Court from hearing such a case. *See Bunting*, 541 U.S. at 1023; Timothy S. Bishop, *et. al.*, *Supreme Court Practice* 87 (9th ed. 2007) (noting that the language of the *certiorari* statute, using "any party," 28 U.S.C. § 1254(1), is "broad enough to encompass the successful or prevailing party before the court of appeals"). Indeed, this Court "ha[s] in the past entertained two appeals on collateral issues by parties who won below." *Bunting*, 541 U.S. at 1024. *See Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 334 (1980) ("In an appropriate case, appeal may be permitted from an adverse ruling collateral to the

judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III"); *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) (allowing party to appeal a decree in his favor where the decree adjudged one of the issues against the interests of the party).

More traditionally, if the underlying constitutional ruling is a close or controversial one, it is likely to provoke a circuit conflict that is grounds for review under this Court's normal rules. In short, the unappealability problem arises infrequently and is resolvable by this Court when it arises.

B. Any Modification Of The *Saucier* Rule Should Only Permit Exceptions In A Narrow And Defined Set Of Circumstances

Even if this Court decides to relax the strict application of *Saucier*, it should establish a strong presumption in favor of first resolving the constitutional issue when adjudicating qualified immunity claims, and should narrowly define the circumstances in which that presumption may be overcome.[6] The broad exceptions advocated by Petitioners and their *amici* would undermine what *Saucier* was intended to achieve and restore the legal confusion that *Saucier* was designed to end.

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[6] The United States appears to agree on this point, stating that lower courts should be permitted to "skip the first step of the inquiry when considerations of sound judicial administration weigh *heavily* in favor of deciding the case under the second step." U.S. Br. at 8 (emphasis added).

1. Courts should not deviate from *Saucier* because a case is fact-intensive

Some lower courts have favored deviating from *Saucier* when the case is fact-intensive on the theory that constitutional determinations in such cases require fact-gathering that is inappropriate at the qualified immunity stage. *See, e.g., Kalka v. Hawk*, 215 F.3d 90, 97 (D.C. Cir. 2000). It is a false conclusion resting on a false premise. The constitutional determination in the qualified immunity inquiry, like the "clearly established" prong of the test, does not require courts to conduct discovery or other fact-finding. Because a qualified immunity defense is typically raised through a motion to dismiss, the constitutional question is whether "the plaintiff has *alleged* the deprivation of an actual constitutional right." *Wilson*, 526 U.S. at 609 (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)) (emphasis added); *Kalka*, 215 F.3d at 101 (Tatel, J., concurring). This is a purely legal question. *Siegert*, 500 U.S. at 232.[7]

Assuming facts for the constitutional inquiry required by step one of the *Saucier* rule is no different than assuming the same set of facts for the "clearly established" inquiry required by step two. It is impossible to know whether a right was "clearly established" without measuring that right against an assumed set of facts. Nor is it different than adjudicating any other motion to dismiss, which

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[7] If the qualified immunity claim is brought at the summary judgment stage, the proper standard is to view the facts "in the light most favorable to . . . the nonmoving party." *See Hope v. Pelzer*, 536 U.S. at 733 n.1.

requires courts to "assume the truth of the material facts as alleged in the complaint." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991).

The United States suggests that clarifying the applicable law is less important when the underlying constitutional right depends on a "totality-of-the-circumstances" analysis. U.S. Br. 25. However, the rights-clarifying function of *Saucier* is well-served even when the constitutional right is fact-dependent. Fact-intensive claims, such as Fourth Amendment excessive force claims and First Amendment claims of public employees, require fact-specific precedent to overcome a claim of immunity. *See Bartlett v. Fisher*, 972 F.2d 911, 918 n.3 (8th Cir. 1992) ("Factually analogous cases are highly relevant to the qualified immunity inquiry when the constitutional right in question is subject to a balancing test."); Anne Gasperini DeMarco, The Qualified Immunity Quagmire in Public Employees' Section 1983 Free Speech Cases, 25 Rev. Litig. 349, 362-370 (2006) (describing the problems arising from determining clearly established rights in fact-specific balancing tests). Thus, not only does the merits determination serve its purpose, but it fills a particularly necessary role of constitutional elaboration in fact-intensive cases.

2. Courts Should Not Deviate From *Saucier* Because A Defendant Chooses Not To Contest The Constitutional Issue

Amici State of Illinois, *et al.*, suggest that *Saucier* should be abandoned because "some parties will rationally choose to devote little time and effort

to the constitutional issue." Illinois Br. at 20. This is a bootstrap argument. Defendants are less likely to ignore the constitutional issue if they understand clearly that it is a necessary first step in the qualified immunity determination. And, defendants who make the tactical decision to place all their eggs in the "clearly established" basket of step two, do so understanding the risk that the court will decide the constitutional issue despite their choice to ignore it or give it short shrift.

A court's constitutional decision-making may be better informed if it has the benefit of zealous advocacy by both sides. But the advantages of clarifying the law do not disappear merely because defendants choose not to defend their position vigorously.[8] In any event, courts can order supplemental briefing, which is the posture of course in which the *Saucier* issue is now before this Court. J.A. 395.

More fundamentally, conscientious government officials should want to know the constitutional boundaries of their behavior. The desire to maintain a state of continued ambiguity may serve the interests of individual officials in avoiding personal liability but the government's larger interest is in understanding and following the law. *See* Graebe,

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[8] When appropriate, this Court has decided important issues of constitutional law *sua sponte*, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and has explicitly endorsed *sua sponte* decisions when parties have been given "ample opportunity to address the issue." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (affirming the Court of Appeals' decision to consider the validity of a law even when parties did not contest the issue).

supra, at 495 (the clarification of constitutional standards might be "a matter of institutional concern to the government unit that employs the defendant").

3. Courts Should Not Deviate From *Saucier* Whenever Fourth Amendment Rights Are At Stake

Petitioners ask this Court to "limit or overrule *Saucier* . . . in the Fourth Amendment setting." Pet. Br. at 19. They first propose that this Court eliminate *Saucier*'s mandatory order of analysis for all Fourth Amendment claims. *Id.* Petitioners suggest that because criminal defendants are constitutionally entitled to an attorney, they file motions to suppress with "tremendous frequency," eliminating the need for courts to clarify Fourth Amendment law in damages actions against governmental actors. Pet. Br. at 57-58. This both understates the constraints on the exclusionary rule, *see* n.4, *supra*, and overstates the reach of suppression motions. As even Petitioners acknowledge, for example, excessive use of force claims "rarely if ever arise in criminal cases: because an officer's use of excessive force does not ordinarily lead to the discovery of evidence, a defendant cannot claim that the evidence was a 'fruit' of the excessive use of force." Def. Br. at 58-59. *See also* U.S. Br. 25 n.1 (observing that in "excessive-force cases under the Fourth Amendment, Section 1983 or *Bivens* actions may provide the only realistic avenue of fashioning clear constitutional rules for officers in the field").

Alternatively, Petitioners propose that "the existing *Saucier* rule should be limited to Fourth

Amendment claims that do not involve fruits of the poisonous tree and therefore will not be addressed under the exclusionary rule." Pet. Br. at 19. That argument also proves too much. If charges are dropped or the defendant is acquitted based on a successful motion to suppress, as in this case, the underlying constitutional claim has already been addressed in one proceeding and there is no reason not to consider it again in a civil damages action. Certainly, the rule of constitutional avoidance no longer applies at that point.

Conversely, a defendant who is convicted following an unsuccessful suppression motion is barred from seeking civil damages until the conviction is overturned *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (limiting damages actions that would imply the invalidity of a conviction or sentence to those where plaintiff can "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."). If there is no § 1983 action, *Saucier* cannot be invoked.

4. A Narrow Exception To *Saucier* May Make Sense When Federal Courts Are Required To Interpret Uncertain State Law As A Predicate To Any Constitutional Ruling

Saucier is designed to encourage clarification of the law when important constitutional rights are at stake. In some circumstances, however, the existence *vel non* of a federal constitutional right

turns on an unresolved question of state law. *See, e.g., Tremblay v. McClellan*, 350 F.3d 195, 199-200 (1st Cir. 2003) (resolving the constitutional issue required an interpretation of the state protective custody statute); *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 57-58 (2d Cir. 2003) (resolving the Fourth Amendment claim depended on the state law right power of the conservator); *Santana v. Calderon*, 342 F.3d 18, 29-30 (1st Cir. 2003) (deciding the constitutional issue required unresolved issue of whether an employee had property interest in continued employment under Puerto Rico commonwealth law). Under these circumstances, the rights-clarifying benefit of *Saucier* is at its lowest because the constitutional decision only provisionally clarifies the law and is subject to reversal as a result of subsequent state proceedings. *See Ehrlich*, 348 F.3d at 57-58. While we do not believe that any modification of *Saucier* is necessary, a modification of this sort at least preserves *Saucier's* essential and still valuable purpose intact.

CONCLUSION

For the reasons stated herein, this Court should refuse to extend the doctrine of consent-once-removed to informants and should reaffirm the "essential holding" of *Saucier v. Katz, supra.* The judgment below should therefore be affirmed.

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AMICUS CURIAE BRIEF

95

No. 07-751

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In the Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE, DWIGHT JENKINS, CLARK THOMAS, AND JEFFREY WHATCOTT,

PETITIONERS,

v.

AFTON CALLAHAN,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This *amicus* brief will address the following questions:

1. Whether this Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?

2. Whether, at the time of the events at issue, it was "clearly established" that the Fourth Amendment prohibits police officers from entering a home after a confidential informant was admitted inside to purchase drugs, completed the purchase, and then signaled the purchase to the officers waiting outside.

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INTEREST OF THE *AMICI CURIAE*

To prevail, respondent must make two showings—first, that petitioners entered respondent's home in violation of the Fourth Amendment and, second, that the right violated was "clearly established" at the time of petitioners' conduct. These elements reflect the two stages of the qualified immunity inquiry under *Saucier v. Katz*, 533 U.S. 194 (2001), which requires federal courts initially to resolve whether the plaintiff has alleged the violation of a cognizable constitutional right before determining whether that right was clearly established and, therefore, whether the defendant enjoys qualified immunity.

Amici States respectfully urge this Court to revisit and abandon *Saucier*'s rigid, two-step process for resolving qualified immunity claims. As shown below, petitioners are entitled to immunity under the second *Saucier* prong because, taking the facts in the light most favorable to respondent, petitioners' conduct did not violate any clearly established Fourth Amendment right. In cases like this one, where it is plain that the constitutional right in question was not clearly established at the time of the alleged misconduct, requiring courts to undertake the first *Saucier* inquiry and resolve the merits of the plaintiff's constitutional claim places needless burdens on courts and litigants, can require courts to make novel constitutional rulings without thorough briefing or a sufficient record, and often insulates such rulings from review.

Because state officers and employees regularly are defendants in actions brought under 42 U.S.C. § 1983, *amici* States have a strong interest in how federal

courts decide whether state defendants are protected by qualified immunity. The States also have a substantial interest in how federal courts define and develop the constitutional limits on official conduct. In this regard, *Saucier*'s strict, two-step sequence not only makes litigation more burdensome, but also increases the likelihood of erroneous constitutional pronouncements that may be immune from appellate review.

Amici States also have a substantial interest in the merits of this case and a critical stake in the lower courts' correct implementation of qualified immunity doctrine. The doctrine, which requires plaintiffs to show that their asserted constitutional rights were "clearly established," not "at a high level of generality," but "in a more particularized, and hence more relevant, sense," *Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (internal quotation marks omitted), was incorrectly applied by the court of appeals in this case.

STATEMENT

Because this case comes to the Court from the denial of petitioners' motion for summary judgment, all facts are taken in the light most favorable to respondent.

1. On March 19, 2002, petitioners, five law enforcement officers and members of the Central Utah Narcotics Task Force, conducted a police raid at respondent's home. Pet. App. 2. Petitioners acted on information provided by a confidential informant. *Id.* at 2-3.

The informant stated that he had negotiated with respondent to purchase a quantity of methamphetamine at respondent's home that night for $100. *Ibid.* After obtaining this information, petitioners decided to monitor the planned transaction. *Id.* at 3. Petitioners searched the informant for drugs, equipped him with a wire and transmitter, gave him a marked $100 bill, and worked out a signal for him to give petitioners when the transaction was complete. *Ibid.* Petitioners then drove the informant to respondent's home. *Ibid.*

Respondent's daughter let the informant in, and, once inside, the informant gave respondent the marked bill in exchange for a small plastic bag of methamphetamine, which respondent removed from a large plastic bag containing a number of smaller bags. *Id.* at 3, 34. The informant then signaled petitioners. *Id.* at 3. Petitioners entered the home and saw respondent drop the large plastic bag. *Ibid.* Petitioners searched the informant and respondent, and, with respondent's consent, they searched the home. *Id.* at 3-4. Petitioners found the small bag of methamphetamine in the informant's pocket. *Id.* at 4, 36. They also found the marked bill on the respondent's person and drug syringes in his home. *Id.* at 4. Petitioners did not have a search or arrest warrant. *Ibid.*

2. Based on the evidence recovered, respondent was charged with possession and distribution of methamphetamine. *Ibid.* He filed a motion to suppress this evidence, which the state trial court denied. *Id.* at 4, 37. Respondent then entered into a conditional guilty plea, reserving the right to appeal

the denial of his motion to suppress. *Id.* at 37. On appeal, the state appellate court reversed the trial court's denial of the suppression motion and reversed respondent's conviction. *Id.* at 4.

3. Respondent filed suit under 42 U.S.C. § 1983 against petitioners, the task force, and various local governments. *Id.* at 4-5, 39. Respondent alleged, in relevant part, that petitioners violated his Fourth Amendment rights when they entered his home without a warrant. *Id.* at 4-5, 40-41. After determining that neither the law of the case doctrine nor collateral estoppel precluded it from reviewing the constitutionality of petitioners' actions, the district court granted petitioners qualified immunity. *Id.* at 41-56.

4. In reaching this conclusion, the district court noted that three circuits—the Sixth, Seventh, and Ninth—have upheld an exception to the warrant requirement when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. *Id.* at 47-48. In addition, the Sixth and Seventh circuits have extended this "consent-once-removed" doctrine to confidential informants. *Id.* at 48-50. Neither this Court nor the Tenth Circuit had addressed the question, however. *Id.* at 52-53. Under these circumstances, the court concluded that "the simplest approach" was to assume that petitioners had violated respondent's constitutional rights. *Id.* at 53.

Thus, the district court proceeded directly to the second step of *Saucier*, asking whether respondent could demonstrate that petitioners had violated a

clearly established right. *Ibid.* "A right is 'clearly established,'" the court explained, "if Supreme Court or Tenth Circuit case law exists on point or if the 'clearly established weight of authority from other circuits' found a constitutional violation from similar actions." *Id.* at 53-54 (quoting *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1251 (10th Cir. 1999)). Because three circuits had approved of petitioners' actions, and because neither this Court nor the Tenth Circuit had disapproved of them, the court concluded that petitioners were entitled to qualified immunity. Pet. App. 55-56.

5. Over a dissent by Judge Kelly, the Court of Appeals reversed. As required by *Saucier*, the panel majority evaluated petitioners' qualified immunity claim in two stages, asking first whether the facts alleged "establish that the defendant[s] violated a constitutional right" and then examining whether "the violated right was clearly established." *Id.* at 67 (internal quotation marks and citation omitted).

The majority answered both questions in the affirmative. *Id.* at 8-18. The court did not doubt that there exists an exception to the warrant requirement when "an undercover officer * * * summon[s] backup officers within a home after that officer has been invited with consent." *Id.* at 14. Deeming the distinctions between an undercover officer and an informant "significant," however, the majority held that petitioners' conduct violated respondent's "right to be free in one's home from unreasonable searches and arrests." *Id.* at 11, 15. The majority further determined that this right was clearly established at the time of the events at issue because both this Court

and the Tenth Circuit have long held that "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions" to the warrant requirement of consent and exigent circumstances. *Id.* at 16. The majority acknowledged that, prior to these events, the Seventh Circuit had applied the consent-once-removed doctrine to a confidential informant. *Id.* at 17. The panel held, however, that "[t]he precedent of one circuit cannot rebut that the 'clearly established weight of authority' is as the Tenth Circuit and the Supreme Court have addressed it." *Ibid.*

8. In dissent, Judge Kelly rejected the panel majority's resolution of both *Saucier* questions. About the second *Saucier* inquiry, Judge Kelly described the panel's approach as "flawed" because it characterized the relevant right "in overly broad terms." *Id.* at 28. As the dissent explained, "[p]roperly characterized, the right at issue * * * is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause." *Id.* at 27. Because, prior to the events at issue, neither this Court nor the Tenth Circuit had recognized such a right, and, moreover, "three circuits had issued opinions which could have led a reasonable officer to believe that a warrantless entry was legal in this case," the dissent concluded that the right, if it existed, was not clearly established, and petitioners therefore were entitled to qualified immunity. *Id.* at 28-29.

9. This Court granted certiorari on March 24, 2008. The Court directed the parties, in addition to the two

questions presented, to brief and argue a third question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?"

SUMMARY OF ARGUMENT

This Court should overrule the strict two-step framework mandated by *Saucier* for resolving qualified immunity claims, a framework that "a majority of the Justices have questioned * * * in recent years." *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring); see also *Purtell v. Mason*, No. 06-3176, 2008 WL 2038893, at * 5 (7th Cir. May 14, 2008) ("This 'rigid order of battle' has been criticized on practical, procedural, and substantive grounds."). Requiring courts to decide whether a § 1983 plaintiff has stated a cognizable constitutional claim in every case before permitting analysis of whether such a claim was "clearly established" (1) imposes unnecessary burdens on courts and parties; (2) threatens to insulate many constitutional rulings from review on appeal; (3) requires courts to make constitutional pronouncements even where one or both parties have not argued the point thoroughly or the record is inadequate; and (4) is unnecessary to ensure the continued development of constitutional doctrine and, ironically, actually threatens to undermine this goal. Accordingly, *amici* States respectfully urge the Court to abandon *Saucier*'s mandatory two-step approach to qualified immunity claims.

In addition, *amici* States urge this Court to reverse the judgment below and, in so doing, to reinforce the principle—disregarded by the Court of Appeals—that government defendants lack qualified immunity only where the constitutional right at issue was "clearly

established" in a sufficiently "particularized" way. *Brosseau*, 543 U.S. at 198-199.

ARGUMENT

The qualified immunity doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, *supra*, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the plaintiff has alleged the violation of a cognizable constitutional right; second, if the plaintiff has alleged such a violation, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. 533 U.S. at 201.

Amici States argue two points here. First, *Saucier*'s rigid two-step framework causes a host of problems for courts and litigants and threatens the integrity of constitutional decisionmaking. To avoid these undesirable results, this Court should abandon the requirement that courts deploy the two-step sequence in every case. Second, with respect to the instant case, the Court of Appeals erred in holding that respondent's alleged Fourth Amendment right was "clearly established" without requiring him to make the more particularized showing that this Court's precedents demand. Under the proper standard, petitioners were entitled to qualified immunity.

I. THIS COURT SHOULD OVERRULE *SAUCIER V. KATZ*.

In a series of decisions prior to *Saucier*, this Court recommended without requiring the aforementioned two-step procedure for resolving qualified immunity claims. See, *e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) ("[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."). In *Saucier*, the Court expressly held that the two-step framework was not simply approved, but mandated for use in all qualified immunity cases: "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence." 533 U.S. at 200. At the "threshold," the court must decide whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Ibid.*

For the following reasons, this Court should no longer mandate this two-step procedure, and instead should permit federal courts to grant qualified immunity without first deciding the merits of the plaintiff's constitutional claim.

A. The Mandatory, Two-Step Framework Has Drawn Criticism From Members Of This Court, And Lower Courts Have Sought To Limit Its Effect.

Several Members of this Court have expressed strong opposition to imposing a mandatory, two-step "order of battle" whenever a government official seeks qualified immunity. See, *e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 1019 (2004) (Stevens, J., joined by Ginsburg & Breyer, JJ., respecting denial of certiorari) (criticizing the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *id.* at 1025 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review * * * or else drop any pretense at requiring the ordering in every case.") (emphasis in original); *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (urging Court to reconsider *Saucier*'s "rigid 'order of battle,'" which "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court"); see also *Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring in the judgment) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate

courts that they should resolve the constitutional question first.").

In the past year alone, Justice Breyer has twice urged the Court to "end the failed *Saucier* experiment now." *Morse v. Frederick*, 127 S. Ct. 2618, 2642 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); see also *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring). The rule of *Saucier*, he explained, is problematic for four independent reasons:

> [s]ometimes (*e.g.*, where a defendant is clearly entitled to qualified immunity) *Saucier*'s fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (*e.g.*, where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes * * * the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."

Scott, 127 S. Ct. at 1780 (Breyer, J., concurring) (quoting *Spector Motor Servs., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

In light of these concerns, lower courts have nibbled at the rule's edges in certain defined circumstances and

even departed from the two-step protocol on more general terms. For example, several courts have identified an "exception" to the *Saucier* rule in cases where resolution of the constitutional question requires clarification of an ambiguous state statute. *Egolf v. Witmer*, No. 06-2193, 2008 WL 2151823, at * 3-4 (3d Cir. May 22, 2008); accord *Tremblay v. McClellan*, 350 F.3d 195, 200 (1st Cir. 2003); *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 57-60 (2d Cir. 2003). Justifying the decision to grant qualified immunity to the defendant without first resolving, under *Saucier*'s first prong, whether the defendant's conduct violated the constitution, these courts have explained that *Saucier*'s "underlying principle" of encouraging federal courts to decide unclear legal questions in order to clarify the law for the future "is not meaningfully advanced * * * when the definition of constitutional rights depends on a federal court's uncertain assumptions about state law." *Egolf*, 2008 WL 2151823, at * 3-4; accord *Tremblay*, 350 F.3d at 200; *Ehrlich*, 348 F.3d at 58.

Similarly, other courts have recognized that the two-step inquiry "is an uncomfortable exercise where * * * the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed," and suggested, as a result, that "[i]t may be that *Saucier* was not strictly intended to cover" this situation. *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 69-70 (1st Cir. 2002); see also *Robinette v. Jones*, 476 F.3d 585, 592 n.8 (8th Cir. 2007) (declining to follow *Saucier* because "the parties have provided very few facts to define and limit any holding" on the constitutional question).

Likewise, when presented with a constitutional question on which this Court had just granted certiorari, the Ninth Circuit elected to "bypass *Saucier*'s first step and decide only whether [the alleged right] was clearly established." *Motley v. Parks*, 432 F.3d 1072, 1078 & n.5 (9th Cir. 2005). And in an appeal where the district court granted judgment to the defendant under Fed. R. Civ. P. 50 on qualified immunity grounds while skipping the constitutional question, the Third Circuit elided the first prong, stating its belief "that the circumstances here * * * are sufficiently unlike those in *Saucier* and *Siegert* that we may proceed directly to the qualified immunity issue without ruling preliminarily on the constitutional violation claim." *Carswell v. Borough of Homestead*, 381 F.3d 235, 241 (3d Cir. 2004). Finally, in a case where "there [wa]s little chance that any unsettled constitutional issues will escape federal review for long" because the disputed constitutional right could be litigated in a related criminal proceeding, the Second Circuit moved directly to the second *Saucier* inquiry. *Koch v. Town of Brattleboro*, 287 F.3d 162, 166 (2d Cir. 2002).

Lower courts have also departed from the *Saucier* protocol on more general terms, without articulating a justification based upon the particular circumstances of the case. See, *e.g.*, *Higazy v. Templeton*, 505 F.3d 161, 179 n.19 (2d Cir. 2007) ("We do not reach the issue of whether [plaintiff's] Sixth Amendment rights were violated because principles of judicial restraint caution us to avoid reaching constitutional questions when they are unnecessary to the disposition of the case."); *Cherrington v. Skeeter*, 344 F.3d 631, 640 (6th Cir. 2003) ("[I]t ultimately is unnecessary for us to decide

whether the individual Defendants did or did not heed the Fourth Amendment command * * * because they are entitled to qualified immunity in any event."); see also *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) ("[w]hether this rule is absolute may be doubted"); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275, 1277 (2006) (referring to *Saucier*'s mandatory two-step framework as "a new and mischievous rule" that "involves so many and such serious problems that I am not sure where to begin"). Indeed, in this very case, the district court, after discussing the complexities of the constitutional issue presented, "assume[d]" a Fourth Amendment violation and moved directly to the second *Saucier* prong. Pet. App. 53. As the dissent noted on appeal, this approach "clearly violated" *Saucier*'s command. *Id.* at 19 n.1.

The lower courts' noncompliance with *Saucier*'s mandatory framework has not escaped attention. Justice Scalia has observed that the "understandable concern" with *Saucier* "has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory." *Bunting*, 541 U.S. at 1024 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) (citing cases). Shortly after that observation—and notwithstanding the caveat that the *Saucier* protocol was mandatory—the Court in *Brosseau* resolved a § 1983 damages case under *Saucier*'s second prong, without resolving under the first prong whether the plaintiff had alleged a constitutional violation. See 543 U.S. at 198. In so doing, the Court stated that it had "no occasion * * * to reconsider [its] instruction in *Saucier* * * * that lower courts decide the constitutional question prior to

deciding the qualified immunity question," explaining that it was "exercis[ing] [its] summary reversal procedure * * * simply to correct a clear misapprehension of the qualified immunity standard." *Id.* at 198 n.3. Here, by contrast, the Court granted certiorari on both prongs of the *Saucier* analysis, which makes this case an appropriate one to reassess *Saucier*'s rule that courts must address the first prong before reaching the second.

B. *Saucier* Forces Courts To Make Unnecessary Constitutional Rulings, While Insulating Many Of These Decisions From Further Review.

Requiring courts to decide the merits of a § 1983 plaintiff's constitutional claim—even where the defendant obviously enjoys qualified immunity because the constitutional right in question indisputably was not "clearly established" at the time of the alleged misconduct[1]—departs from the fundamental principle that courts should render constitutional decisions only where doing so is essential to decide the case. See *Scott*, 127 S. Ct. at 1774 (*Saucier*'s "ordering contradicts '[o]ur policy of avoiding unnecessary adjudication of constitutional issues'") (quoting *United States v. Treasury Employees*, 513 U.S. 454, 478 (1995)) (brackets in original); *Lewis*, 523 U.S. at 841 n.5

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[1] For example, if the defendant's conduct had been held unconstitutional by five circuits and constitutional by five others, then the defendant indisputably would be entitled to qualified immunity under *Saucier*'s second prong despite the difficulty of resolving under the first prong whether the conduct itself was unconstitutional.

(acknowledging two-step protocol as an exception to "the generally sound rule of avoiding determination of constitutional issues"); see generally *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); Commencement Address of Chief Justice John G. Roberts, Jr., Georgetown Law School (May 21, 2006) ("If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.") (webcast available at www.law.georgetown.edu. webcast/eventDetail.cfm?eventID=144).[2]

On its own, this longstanding principle of judicial restraint counsels in favor of affording courts the flexibility to resolve qualified immunity cases without first reaching the merits of the constitutional question. See *Lewis*, 523 U.S. at 859 (Stevens, J., concurring in the judgment) ("When * * * [the constitutional]

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[2] "Outside of the qualified-immunity context, [there is] just one setting in which federal courts *must* address constitutional questions before non-constitutional questions—when they adhere to the Article III requirement that they resolve jurisdictional issues before merits issues—and that issue plainly does not apply" in the qualified immunity context. *Lyons*, 417 F.3d at 581 (Sutton, J., concurring) (emphasis in original); see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). This exception for jurisdictional questions is necessary because, "unless Article III standing is satisfied, the court has no power to rule on the other issues in the case." Leval, *supra*, at 1277 n.83.

question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."). The Second Circuit cited the virtue of judicial restraint to justify exercising its "discretion to refrain" from undertaking the first step of the *Saucier* test. *Koch*, 287 F.3d at 166 ("This procedure avoids the undesirable practice of unnecessarily adjudicating constitutional matters."); see also *Purtell*, 2008 WL 2038893, at * 5 n.1 ("among other things," "[t]he 'rigid' order of the *Saucier* test * * * forces courts to resolve constitutional questions unnecessarily when there is no clearly established right").

Saucier not only requires courts to make unnecessary constitutional holdings, but also insulates many such holdings from further review. See *Brosseau*, 543 U.S. at 202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (observing that two-step rule "can sometimes lead to a constitutional decision that is effectively insulated from review"). This occurs when a court holds that the defendant's conduct violated a cognizable constitutional right, but proceeds to grant judgment to the defendant because that right was not clearly established. As the prevailing party, the defendant cannot appeal or seek certiorari review from the adverse constitutional ruling. See *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999) ("The government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts."); *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) ("[S]ome constitutional rulings effectively will be insulated from review by the *en banc* court of appeals or the Supreme Court where the appellate panel identifies a

constitutional violation but grants qualified immunity under the second inquiry."); *Vives v. City of New York*, 405 F.3d 115, 123 (2d Cir. 2005) (Cardamone, J., concurring in part, dissenting in part) (inability to appeal constitutional ruling when defendant prevails on qualified immunity "is, of course, an inescapable result of the sequential order of the *Saucier* inquiry").

The problem and its consequences are illustrated by *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004). Following the *Saucier* procedure, the Fourth Circuit first held that the Virginia Military Institute's use of the word "God" in a "Supper Roll Call" ceremony violated the Establishment Clause, but then granted the defendants qualified immunity because the law was not clearly established at the relevant time. *Id.* at 365-376. Although they had the judgment, the defendants sought certiorari review of the adverse constitutional ruling. Dissenting from the denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making." *Bunting*, 541 U.S. at 1022. The "tangle" arose from the Court's "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, which insulated from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings. *Id.* at 1023; see also *Kalka v. Hawk*, 215 F.3d 90, 96 n.9 (D.C. Cir. 2000) (noting that "[n]ormally, a party may not appeal from a favorable judgment" and that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court").

In cases like *Bunting*, the "prevailing" defendant faces an unenviable choice: "comply[] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari] review," or "defy[] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits" and potential "punitive damages." *Horne*, 191 F.3d at 247-248. This result is patently unfair to government officials and the governments they serve, for an unreviewable constitutional holding announced by a court of appeals under *Saucier*'s first prong may in the future be held to have "clearly established" the constitutional standards with which state and local officials must comply.

C. *Saucier*'s Mandatory, Two-Step Rule Burdens Courts And Litigants, And Requires Constitutional Decisionmaking Without Sufficient Argument Or Record Evidence.

"[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense." *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring). The *Saucier* rule requires courts to delve into and decide constitutional disputes in every case, even those easily resolved under the second prong for lack of any "clearly established" right. See *Scott*, 127 S. Ct. at 1774 n.4 ("There has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward."); see also *Horne*, 191 F.3d at 249 ("For a judiciary that is already heavily

burdened with cases it *must* decide, offering an unnecessary but simple solution to an easy problem is better justified than undertaking unnecessarily to untangle a difficult, complex issue.") (emphasis in original) (footnote omitted).

Saucier also requires defense counsel to advance potentially complex constitutional arguments on the first *Saucier* prong, even where counsel is confident of winning the case on the second prong. Adding to counsel's time, and defendant's expense, in this way undermines the very purpose behind the qualified immunity doctrine—to shield official defendants from "the burdens of litigation." *Brosseau*, 543 U.S. at 198; see also *DiMeglio v. Haines*, 45 F.3d 790, 798 (4th Cir. 1995) ("requiring that courts conduct a * * * merits review would threaten to increase the burden of defending suits for public officials whose conduct was reasonable, by expanding the number of issues officials must prepare to address, brief, and argue").

Experience teaches that some parties will rationally choose to devote little time and effort to the constitutional issue presented in step one. See *Motley*, 432 F.3d at 1077 ("The parties urge us to skip the first step of the *Saucier* analysis. They ask us to assume that the officers violated Motley's constitutional rights * * * and determine whether those rights were clearly established * * * ."); *Vives*, 405 F.3d at 118 n.7 ("We do not reach the constitutional question because we are reluctant to pass on the issue in *dicta* and because the parties did not genuinely dispute the constitutionality of [the challenged law] either in the District Court or on appeal."); *African Trade & Info. Ctr. v. Abromaitis*, 294 F.3d 355, 359 (2d Cir. 2002) (skipping to second

step of analysis because, *inter alia*, "the merits of [the constitutional] issue [were] scarcely mentioned in the briefs on appeal, let alone adequately briefed").

The reason for this is not difficult to ascertain. Individual defendants in § 1983 suits, particularly those employed by municipalities, are often represented by private counsel, who collectively and understandably have less interest in the long-term effects of an adverse constitutional ruling than in winning the case as efficiently and inexpensively as possible for their clients. See generally *Horne*, 191 F.3d at 247 ("[P]arties may do an inadequate job briefing and presenting an issue that predictably will have no effect on the outcome of the case."). For the same reason, even if it were somehow possible for prevailing defendants to appeal from an adverse constitutional ruling on *Saucier*'s first prong, see *supra* pp. 17-19, such defendants often will have no incentive to do so, and the plaintiff (having lost on the "clearly established" prong) may have no incentive to defend the lower court's constitutional decision. See Leval, *supra*, at 1279 ("Even if the defendant officer could appeal from the dictum, in many cases he would not do so. He has won the case. * * * [E]ven if the defendant did care and did appeal, at this point the plaintiff would likely have no interest in the appeal.").

For courts, too, the fact that a constitutional question has no impact on a case's outcome may detract from the quality of decisionmaking. See *Horne*, 191 F.3d at 247 ("Judges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication."). As Judge

Leval recently explained in concluding that "*Saucier* is a blueprint for the creation of bad constitutional law":

> [T]he fact is, in many cases neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case. The court's conclusion on this question will come at no price.

Leval, *supra*, at 1278-1279 (footnotes omitted).

Compounding these problems is the fact that *Saucier* compels courts to make constitutional decisions on an inadequate record. Settled precedent encourages defendants to raise qualified immunity early in litigation, including on a motion to dismiss, for "the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery." *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (emphasis in original) (internal quotation marks omitted); see also *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). Yet raising the defense early can force courts to render highly abstract constitutional decisions "on a nonexistent factual record, even where * * * discovery would readily reveal the plaintiff's claims to be factually baseless." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). A government official's decision to assert qualified immunity early in the litigation therefore may result in "the development of legal doctrine that has lost its moorings in the empirical world, and that

might never need to be determined were the case permitted to proceed." *Ibid.* As the Second Circuit noted in one such case,

> [g]iven the scant record before us (as is common in appeals from summary judgment based on qualified immunity), we are faced with three possible courses of action: (1) reach out on an inadequate record to announce a view, in dictum, on a constitutional question whose resolution is unnecessary to decide the case, (2) remand to the district court and direct the district court to require the parties to participate in further proceedings that will have no bearing on the result of their case, or (3) decline to express a view on the underlying constitutional question since we lack adequate information to do so. We think it clear that the third option is the preferable one.

Mollica v. Volker, 229 F.3d 366, 374 (2d Cir. 2000).

In sum, *Saucier* not only requires courts to abandon traditional notions of restraint and resolve constitutional questions unnecessarily, but often does so under unfavorable conditions, without adequate argument from one or both parties, without an adequate record, or without the benefit of appellate review. So, "[j]ust as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, so there is a risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented." *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) (citation omitted).

D. Requiring Courts To Decide Constitutional Claims In Every § 1983 Case Is Not Necessary To Develop The Law.

The Court justified its departure from the usual practice of avoiding non-essential constitutional rulings because "if the policy of avoidance were always followed in favor of ruling on qualified immunity * * *, standards of official conduct would tend to remain uncertain." *Lewis*, 523 U.S. at 841 n.5; see also *Saucier*, 533 U.S. at 201 ("The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."); *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."). But assuring the law's development does not require courts to make constitutional pronouncements in every case; it merely counsels against *prohibiting* courts from doing so. See *Lyons*, 417 F.3d at 581 (Sutton, J., concurring) ("All of this, however, just proves that the 'better approach' in this area is to resolve the first inquiry before the second one. It does not prove that the approach should be followed in *all* cases, and indeed a majority of the Justices have questioned the value of this strict requirement in recent years.") (citation omitted) (emphasis in original).

Abandoning *Saucier*'s mandatory, two-step "order of battle" does not mean categorically *forbidding* courts from deciding whether § 1983 plaintiffs have alleged

cognizable constitutional rights. In many cases, deciding the constitutional question first will be the preferred course. "The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Ibid.* And "[a]dressing a more concrete issue (was there a constitutional violation?) before turning to a more abstract issue (was it clearly established?) will generally present an easier mode of analysis than approaching matters the other way around." *Id.* at 583.

Introducing this flexibility would permit courts to resolve cases solely on the second, "clearly established" step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so. See *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) ("The Court of Appeals adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties."). There are a number of circumstances where such an approach would make sense:

> What of the district court that faces a complaint alleging dozens of constitutional violations? * * * What of the appellate panel facing a set of briefs in which the constitutional question is not only difficult but inadequately briefed? * * * And what of other settings: the appellate panel that cannot agree on the appropriate resolution of the constitutional question but can readily agree on the resolution of the clearly established

> question; the panel faced with a poorly presented constitutional question but an easily resolved clearly established question; the panel faced with a constitutional question that is not only difficult but highly fact specific and therefore unlikely to provide meaningful guidance in future cases; or the panel faced with a constitutional question that is essentially irrelevant to the case at hand because of significant intervening developments in the law?

Lyons, 417 F.3d at 582 (Sutton, J., concurring) (internal citation omitted).

Moreover, constitutional law does not depend for its development on cases where the defendant may seek qualified immunity. Constitutional issues arise in innumerable cases where there is no qualified immunity, such as criminal cases where the defendant seeks to suppress evidence, § 1983 cases against a municipality, or § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See *Lewis*, 523 U.S. at 841 n.5 (noting that qualified immunity is unavailable "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion"); *Virgili v. Gilbert*, 272 F.3d 391, 394 (6th Cir. 2001) (relying solely on "clearly established" prong to decide in defendants' favor, and "not[ing] that ample opportunities exist to establish [the constitutional] standard via other means, for example through actions for declaratory or injunctive relief"); *Charles W. v. Maul*, 214 F.3d 350, 357 (2d Cir. 2000) ("[T]he Court should not determine the existence of the constitutional right alleged if the

question could be decided in proceedings in which qualified immunity is not a defense."); *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1344 n.16 (11th Cir. 1998) ("Refraining (until truly necessary) from deciding—in qualified immunity cases—the more perplexing federal law issues will not inevitably preclude the law in due course from becoming clearly established. Suits seeking injunctions, suits against local governments, and certain criminal proceedings can settle the law."); Leval, *supra*, at 1280-1281 (even without *Saucier*'s rule, repeated conduct is "not likely to repeatedly escape review," for good-faith immunity "does not apply, for example, where an injunction is sought to prevent repetition of the conduct, * * * where the suit is against a municipality based on municipal policy," or "where suppression of evidence is sought").

In sum, there is no reason to presume that constitutional law would stand still if courts enjoyed the discretion to deviate from the *Saucier* rule in certain cases. Indeed, the Court has endorsed this very approach in other areas. For example, in *United States v. Leon*, 468 U.S. 897 (1984), the Court established a good-faith exception to the exclusionary rule that allows the introduction of evidence when an officer executes a search in reasonable reliance on a warrant found on review to have been unsupported by probable cause. See *id.* at 922-923. Addressing the concern that this rule could "preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state," *id.* at 924, the Court reasoned:

> There is no need for courts to adopt the inflexible practice of always deciding whether

> the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. * * * If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.

Id. at 924-925. *Leon* authorizes courts "to exercise an informed discretion" in deciding whether to resolve the constitutional issue before reaching the question of good faith, and, indeed, the Court could identify "no reason to believe that [its] Fourth Amendment jurisprudence would suffer by allowing reviewing courts to" proceed in this manner. *Id.* at 925. And there is none. Following *Leon*'s lead, courts have, where appropriate, resolved the constitutional inquiry prior to addressing the question of good faith. See, *e.g.*, *United States v. Danhauer*, 229 F.3d 1002, 1005 (10th Cir. 2000); *United States v. Hyppolite*, 65 F.3d 1151, 1158 (4th Cir. 1995); *United States v. Diaz*, 529 F. Supp. 2d 792, 793 (S.D. Tex. 2007); *United States v. Fleet Mgmt. Ltd.*, 521 F. Supp. 2d 436, 441 n.2 (E.D. Pa. 2007); *United States v. Smith*, 403 F. Supp. 2d 1061, 1064 (D. Utah 2005); *United States v. Feliz*, 20 F. Supp. 2d 97, 101 (D. Me. 1998); *United States v. Garcia*, 630 F. Supp. 142, 143 & n.3 (S.D.N.Y. 1986); *United States v. Owen*, 621 F. Supp. 1498, 1507 n.5 (D.C. Mich. 1985).

Just as Fourth Amendment jurisprudence has not stood still since the Court decided *Leon*, so, too, has the law continued to develop in other areas in which lower

courts are authorized to bypass a preliminary constitutional question. As Judge Sutton explained, although "the risk of stagnating constitutional doctrines * * * exists in other areas of law," such as the harmless error doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989),

> the ability of courts to skip to the second inquiry (*e.g.*, to go straight to the harmlessness of the error or *Teague's* new-rule inquiry * * *) does not seem materially to have inhibited the development of constitutional law.

Lyons, 417 F.3d at 583. The same could be said of how federal courts resolve habeas cases under 28 U.S.C. § 2254(d)(1), which asks not whether the state criminal court's constitutional ruling was correct on the merits, but whether it was contrary to or an objectively unreasonable application of law clearly established by this Court's precedents. See *Carey v. Musladin*, 127 S. Ct. 649, 652-653 (2006). The same also could be said of how courts resolve ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), which expressly allows such claims to be rejected solely under the prejudice prong without consideration of whether the attorney's performance was constitutionally inadequate. See *id.* at 697. Constitutional criminal law has continued to develop after Congress enacted § 2254(d)(1), see *Musladin*, 127 S. Ct. at 657 (Kennedy, J., concurring in the judgment) (agreeing that relief was unavailable under § 2254(d)(1) because the constitutional rule invoked by habeas petitioner "has not been clearly established by our cases to date," but urging that the rule "be explored in the court system, and then established in this

Court"), as have the standards governing the performance of defense counsel after *Strickland*. Constitutional law governing the conduct of government officials will develop as well even absent *Saucier*.

E. Abandoning The *Saucier* Rule Would Not Offend Principles Of *Stare Decisis*.

Although the Court "approach[es] the reconsideration of [its] decisions * * * with the utmost caution," "[s]*tare decisis* is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule, the existing rule does not achieve its own aim and causes a host of collateral problems, and the precedent has been criticized by several Members of this Court and narrowed and even disregarded by the courts of appeals.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases * * * involving procedural and evidentiary rules." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Like procedural and evidentiary rules, *Saucier*'s two-step protocol does not affect the way that parties order their affairs. Abandoning *Saucier*'s categorical rule would not upset settled expectations on anyone's part. See *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

Nor does this matter implicate "the general presumption that legislative changes should be left to Congress." *Khan*, 522 U.S. at 20. "[C]onsiderations of

stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Not so here. Because the *Saucier* rule is judge-made, only this Court can change it.

Moreover, the "Court has never felt constrained to follow precedent" "when governing decisions are unworkable or are badly reasoned." *Payne*, 501 U.S. at 827 (internal quotation marks omitted). For the reasons set out above (see *supra* pp. 15-30), a mandatory, two-step rule for resolving all qualified immunity claims has had unforeseen, adverse collateral consequences, is unnecessary to advance the goal put forth as its justification, and in fact undermines that goal to a certain extent.

Finally, several Members of this Court have criticized the *Saucier* rule, and courts of appeals have sought to narrow the rule or disavow it altogether. See *supra* pp. 10-15. These factors, too, make reconsideration appropriate. See *Crawford v. Washington*, 541 U.S. 36, 60 (2004) ("Members of this Court * * * have suggested that we revise our doctrine * * * ."); *Payne*, 501 U.S. at 829-830 (overturning past decisions of the Court that had "been questioned by Members of the Court in later decisions, and [had] defied consistent application by the lower courts").

* * *

Saucier's rigid, two-step formula imposes burdens on courts and litigants, threatens to detract from the quality and coherence of constitutional decisionmaking, and is wholly unnecessary to achieve

its stated purpose. Accordingly, *amici* States respectfully urge the Court to abandon the rule as a requirement for use in every qualified immunity case.

II. THE COURT OF APPEALS' JUDGMENT SHOULD BE REVERSED ON QUALIFIED IMMUNITY GROUNDS.

In the decision below, the panel majority erred in holding that respondent's alleged constitutional right was "clearly established" and that petitioners' qualified immunity defense therefore failed. "'[C]learly established' for purposes of qualified immunity requires that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson*, 526 U.S. at 614-615 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (brackets in original). This means that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson*, 526 U.S. at 615. General constitutional standards are rarely sufficient to show that a right is "clearly established"; the right must be established "in a more particularized, and hence more relevant, sense." *Brosseau*, 543 U.S. at 198-199 (2004) (internal quotation marks omitted). The panel majority violated this mandate by denying qualified immunity based on standards that both are overly general and provided no indication that petitioners' conduct violated the Fourth Amendment—to the contrary, the precedent cited by the majority suggests, if anything, that petitioners complied with the Constitution.

The majority held that "the relevant right" here "is the right to be free in one's home from unreasonable

searches and arrests." Pet. App. 15. The majority then cited three decisions of this Court, as well as Tenth Circuit cases, for the general rule that "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions" to the warrant requirement of consent and exigent circumstances. *Id.* at 15-16. Based on these propositions, the majority concluded that respondent's clearly established rights had been violated.

In reaching this conclusion, the majority erred twice. First, it improperly described the relevant right. As the dissent recognized:

> Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause.

Id. at 27 (Kelly, J., dissenting).

This mischaracterization is fatal. As we have explained, the right allegedly violated must be defined with particularity to provide government officials with notice that their conduct is unlawful. Thus, while "[i]t could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clear that the protections of the Fourth Amendment apply to the actions of police," the Court has never endorsed this approach, which does not ensure that officers receive the requisite notice before being subject

to liability. *Wilson*, 526 U.S. at 615. When the right here is appropriately characterized, it is plain that petitioners committed no violation of clearly established law. Prior to the events at issue, neither this Court nor the Tenth Circuit had discussed, much less endorsed, a right to be free from a warrantless entry by police summoned by an informant with consent to enter. See Pet. App. 27 (Kelly, J., dissenting). Given this dearth of guidance, petitioners cannot be said to have violated clearly established law.[3]

Second, even if properly considered, the broad statements of constitutional law upon which the majority relied do not support its rejection of qualified immunity. To the contrary, the majority's view that this Court and its own precedents had clearly limited the exceptions to the warrant requirement to those that are "established," *id.* at 17, undermines rather than supports its determination that petitioners

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[3] Although the Court has recognized that there exist constitutional violations so "obvious" that factually analogous cases are unnecessary, *Brousseau*, 542 U.S. at 199, this case cannot plausibly be claimed to fall into this narrow category, especially since, at the time of petitioners' conduct, every circuit to have considered the consent-once-removed doctrine had endorsed it, see *United States v. Pollard*, 215 F.3d 643, 648 (6th Cir. 2000); *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996), and one circuit had even applied the doctrine to informants, see *United States v. Paul*, 808 F.2d 645, 647-648 (7th Cir. 1986). That other circuits had endorsed petitioners' actions confirms their entitlement to—although it is not a prerequisite for—qualified immunity.

violated clearly established law. As the majority acknowledged, *id.* at 11-12, it has long been settled that the Fourth Amendment's prohibition on warrantless entries into a home does not apply when voluntary consent has been obtained, either from the individual whose property is searched or from a third party with common authority over the premises. See, *e.g.*, *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). As its name indicates, the consent-once-removed doctrine is premised on the presence of consent for entry. Indeed, courts recognizing the doctrine—including the Tenth Circuit in its decision below—have expressly relied on the consent exception to the warrant requirement, specifically, the view that consent received by the undercover officer or informant is sufficient to authorize a search by the officers with whom the undercover officer or informant is working. See Pet. App. 11-12; *United States v. Yoon*, 398 F.3d 802, 806-808 (6th Cir. 2005); *United States v. Bramble*, 103 F.3d 1475, 1478-1479 (9th Cir. 1996); *United States v. Paul*, 808 F.2d 645, 647-648 (7th Cir. 1986); *State v. Henry*, 627 A.2d 125, 129 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759, 762-765 (Wis. 1994).

Thus, contrary to the majority's view, petitioners are not seeking "[t]he creation of an additional exception" to the warrant requirement. Pet. App. 17. As a result, this case bears no comparison to *Groh v. Ramirez*, 540 U.S. 551 (2004), on which the majority relied heavily, notwithstanding that *Groh* postdates the conduct at issue and thus is "of no use in the clearly established inquiry" because it "could not have given fair notice to [the petitioners]." *Brousseau*, 543 U.S. at 200 n.4. In *Groh*, the officer asked the Court "to craft a new exception" to the Fourth Amendment,

specifically, relief from the warrant requirement in cases where the warrant lacks particularity. 540 U.S. at 565. Here, by contrast, petitioners, and the courts that have adopted the approach they advocate, rely on the long-established rule that a warrant is unnecessary when there is consent to the search.

Had the panel adhered to settled qualified immunity standards, it would have granted qualified immunity to petitioners on the ground that respondent's alleged constitutional right was not "clearly established." Its contrary judgment should be reversed.

CONCLUSION

The Court should overrule *Saucier*, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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CORDELL PEARSON, et al.,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AFTON CALLAHAN

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INTEREST OF AMICUS CURIAE[1]

Liberty Legal Institute ("LLI") is a non-profit civil rights law firm dedicated to the preservation of freedoms enumerated in the Bill of Rights. LLI focuses most of its civil rights practice on the preservation of First Amendment liberties, including the vigorous protection of free speech. LLI and its attorneys have argued for broad protection for speech and religious practice. *See, e.g., Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (LLI represented Respondent seeking to preserve the right of candidates to participate in public debate forums); *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (LLI filed an amicus brief seeking to preserve student speech protections); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (LLI filed an amicus brief seeking to strengthen strict scrutiny analysis under the Religious Freedom Restoration Act).

In the present case, LLI is concerned that the erosion of the *Saucier*[2] test in qualified immunity cases will result in the weakening in the rule of law and of civil rights protections of every American. Thus, LLI joins Respondent in urging this Court to uphold the *Saucier* analysis and, alternatively, to

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[1] All parties of record consented to the filing of this brief. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Saucier v. Katz*, 533 U.S. 194 (2001).

introduce minor modifications to the *Saucier* test that will still allow for the rigorous enforcement of civil rights law Congress intended.

SUMMARY OF THE ARGUMENT

This Court's decision in *Saucier*, should be upheld. Prior to *Saucier*'s requisite order of analysis, crucial areas of the law often remained unclear and undefined from case to case. The courts were not required to evaluate the constitutionality of a claim when qualified immunity was at issue. A perpetual game, whether intentional or not, could be played. Despite an actual violation of the Constitution, a Court could say the right at issue was not clearly established at the time of the violation. The Court could then also refuse to define the right and thus ensure perpetual violations could continue with no redress. Consequentially, the applicable law was never "clearly established." Qualified immunity was then repeatedly and unalterably granted for similar egregious constitutional violations with no hope for redress. *See, e.g.*, Section I-A, *infra*.

Saucier corrected the problem of perpetually unenforceable civil rights by requiring the courts to decide the constitutionality of a claimed right before ruling on qualified immunity.[3] Far from compromising

[3] Already *Saucier* can be credited with successful civil rights protections in numerous cases. *See, e.g.*, Section I-B, *infra*.

any rights of government officials, *Saucier* provides the engine for the law's elaboration and clear establishment for future cases that arise under similar circumstances. As a natural outworking of this ordered analysis, *Saucier* works to mitigate erroneous awards of qualified immunity[4] by securing the clear establishment of the applicable law, thus ensuring the non-recurrence of similar error in future cases. This mitigatory result is crucial to the continued efficient operation of the judiciary as this Court cannot review every erroneous award of qualified immunity by the lower courts.

When Courts do not enforce the rule of law, they are making a public policy decision and supplanting the will of Congress, contrary to their role in our constitutional form of government. Congress enacted 42 U.S.C. § 1983. Congress, the elected representatives of the people, made a public policy decision to ensure actual redress for constitutional rights violations. Avoiding the redress of actual violations disrespects that public policy decision, contributes to lawlessness and subverts the Constitution. *Saucier* is a procedural safeguard of deference to the Congressional mandate of enforcement embodied by Section 1983; overruling *Saucier* usurps Congressional power and replaces the will of the people with the will of a Court which then decides on its own whether it will

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[4] An outstanding example of the erroneous award of qualified immunity is found in *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001), *rev'd by*, 536 U.S. 730 (2002).

allow future protection for an actual constitutional violation.

ARGUMENT

I. *Saucier* should be upheld.

Since this Court's rejection of a governmental theory of *respondeat superior*, *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), suits against officials in their personal capacity are the citizen's main recourse for constitutional violations arising under official discretion. When prospective relief is unavailable or insufficient, winning such suits entails overcoming qualified immunity, which was instituted to protect government officials acting in good faith under unclear law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There are certain classes of cases, however, where almost *all* constitutional violations arise under official discretion – e.g., child seizure cases,[5] discriminatory zoning cases[6] and discriminatory hirings.[7] In such cases, prior to *Saucier*, because constitutional merits were

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[5] *See, e.g., Jordan v. Murphy*, 145 Fed. Appx. 513 (6th Cir. 2005).

[6] *See, e.g., Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994).

[7] *See, e.g., Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir. 2007) (holding that a Texas school district could not be sued for discriminatory hiring practices by a superintendent – the final decision maker).

never reached and the law never clarified, qualified immunity could be granted perpetually for similar and repeated gross violations. These violations were effectively beyond the reach of Section 1983,[8] subverting the very purpose for the passage of Section 1983. *See Monell*, 436 U.S. at 686 n. 45.

Saucier's fixed-order two-step analysis corrected this inequity by requiring the courts to rule on whether a constitutional right has been violated regardless of the outcome of the qualified immunity claim. This both clearly defines established rights and ensures those rights are not perpetually violated under the auspicious guise of qualified immunity. These inalienable rights are important and deserve broad protection; "Congress, in enacting § 1 [of the Civil Rights Act of 1871], intended to give a broad remedy for violations of federally protected civil rights." *Monell*, 436 U.S. at 685. Indeed, the intent of Section 1983 was to ensure that citizens not be deprived of the protection of these rights but that they remain protected and valued.

It was not the purpose of qualified immunity to support an unchecked disregard for the law on the part of government officials, and allowing it to do so is grossly inconsistent with both the language and the rule of law. *Cf. Monell*, 436 U.S. at 683-87. This is, however, the inescapable effect of *Monell* and *Harlow* working in tandem without the intervention

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[8] 42 U.S.C. § 1983 (hereinafter "Section 1983").

of *Saucier*. *Saucier* successfully relieves the natural tension between a citizen's right to sue for relief of a constitutional violation and the ability of government officials to perform their duties in good faith, untrammeled by meritless lawsuits. By requiring adjudication of the constitutional claim in a case while upholding the clear law standard, *Saucier* provides ample protection for officials acting in good faith while allowing the elaboration and protection of civil rights as intended by Congress with the passage of Section 1983. A decision by the Court to overturn *Saucier*'s fixed-order analysis would subvert the rule of law by allowing lawless official behavior to commence and continue unchecked.[9]

A. Before *Saucier*, the law remained unclear and certain classes of Constitutional rights were repeatedly violated, leaving Plaintiffs with no option for relief.

There are classes of constitutional violations that nearly always arise under official discretion, and not

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[9] There is an increasing discussion regarding the role of judges in deciding policy issues that are best left to legislative bodies. Yet, judges who refuse to apply the law and who contribute to continued lawlessness are no less culpable than those accused of supplanting the people's representatives' policy preferences for their own. They may be, in fact, more culpable. The refusal to enforce laws specifically passed is at least as equally egregious to "finding" laws. The former is a specific and direct violation of legislative purpose.

written policy or custom.[10] Justice Kennedy's opinion in *Saucier* recognizes the law's need for guidance in such areas, thus guaranteeing that the same violation cannot continue indefinitely. Before *Saucier*, it was not uncommon for a string of similarly clear constitutional violations to continue unrestrained, either permanently or until official behavior became so outrageous that no legal haze could be credibly posited. In such cases, the law prior to suit would be insufficiently clear to deny qualified immunity, and thus immunity would be granted summarily with no elaboration of applicable law. The law would then remain unclear, and immunity would continue to be granted for future violations.

Such an inequitable result is illustrated in a line of cases beginning with *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994). In *Doe*, two social workers manufactured evidence of sexual abuse in order to remove children from their father's custody. Granting the social workers qualified immunity, the court held that the defendants had not violated any clearly established law because the right to family integrity was "nebulous." *Id.* at 1417. In doing so, however, the court failed to remedy the alleged nebulous nature of the proffered right by

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[10] *See, e.g., Jordan v. Murphy*, 145 Fed. Appx. 513 (6th Cir. 2005) (child seizure case); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994) (discriminatory zoning case); *Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir. 2007) (discriminatory hiring case).

determining whether a right had in fact been violated. Thus, in a subsequent child seizure case, *Kiser v. Garrett*, 67 F.3d 1166 (5th Cir. 1995), the Court again awarded qualified immunity to defendant social workers due to the "nebulous" nature of the right to family integrity. Predictably, the court once more failed to establish any parameters to clearly define the right for future child seizure cases. The law thus remained unclear, providing no guidance to this recognized but as yet unclarified right.

Later, both *Doe* and *Kiser* were used as justification to award qualified immunity in yet another child seizure case and show that the right of family integrity was insufficiently defined. The Court found "that neither *Doe* [n]or *Kiser* provide much guidance to state employees charged with investigating possible child abuse," and that therefore there was no violation of a clearly established law. *Strain v. Kaufman County Dist. Attorney's Office*, 23 F. Supp. 2d 685, 691 (N.D. Tex. 1998).[11] A number of other unreported cases followed this same approach.

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[11] The application of the constitutional right of family integrity to child seizure cases was not reached in the Fifth Circuit until a four-year-old child was removed from her parents for *three years* after purportedly typing out descriptions of parental sexual abuse, even though the state recognized within six months that the child could neither read nor even comprehend her own alleged descriptions. The district court concluded the official misconduct in this case was so grave that it "*clearly* shock[ed] the conscience." *Morris v. Dearborne*, 69 F. Supp. 2d 868, 885 (E.D. Tex. 1999); *see Morris v. Dearborne*, 181 F.3d 657

(Continued on following page)

Real constitutional violations can never be redressed under such an approach, despite legislatively passed law to the contrary. Pre-*Saucier*, a judge-made approach was allowed to perpetually trump Section 1983, a statute passed to allow for redress for actual constitutional violations.

By not addressing the question of whether a violation occurred, courts would indirectly ensure that future violations of law could not be addressed as the law would not be clearly established.

B. *Saucier* corrected the problem of perpetually non-litigable civil rights violations.

Without compromising the rights of officials who act in good faith under unsettled law, *Saucier* ensures that any legal haze encountered in civil rights actions will not persist and that applicable rights will be protected against future violation[12] as intended by

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(5th Cir. 1999). Had the Fifth Circuit in an earlier case done the constitutional analysis now required by *Saucier*, parents would not have had to wait for such an egregious violation before officials were required to respect the right of family integrity and not abduct children.

[12] Amici have argued that "qualified immunity's purpose is not to develop constitutional law prospectively [but] it exists as a defense from suit for all but the most seriously incompetent actors," and that *Saucier*'s first prong should therefore be applied only when it favors the state actor. Brief for the Texas Ass'n of School Boards as Amicus Curiae Supporting Respondents at 4-5, *Pearson v. Callahan*, No. 07-751 (Docketed Dec. 6,

(Continued on following page)

Section 1983. Already, adherence to *Saucier* has resulted in further clarification of the law. In *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), a child was removed from his classroom by a social worker for questioning about abuse without the requisite reasonable suspicion of abuse. As the law was not clearly established at the time of the incident, the social worker was granted qualified immunity. In accordance with *Saucier*, however, the Seventh Circuit analyzed the student's claim of a constitutional right and recognized the social worker's actions as a violation of the Fourth Amendment. Due to *Saucier*'s fixed-order analysis, *Doe v. Heck* provided clearly established law for subsequent cases such as *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008).

In *Michael C.*, a social worker removed two students from their classrooms and performed an under-the-clothes examination of their bodies without a warrant or parental permission. The Court recognized the precedent established by *Doe* and therefore refused to grant the social worker qualified immunity. The Court "reiterate[d] *Heck's* definitive holding, along the lines of the Fourth Amendment principles outlined above, that it is a violation of a child's constitutional rights to conduct a search of a child at a

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2007). This seriously misapprehends the point of *Saucier*. The first prong exists not to extend qualified immunity for lawless actors but to balance it against the need for relief from constitutional violations, as intended by Congress in enacting Section 1983.

private school without a warrant or probable cause, consent, or exigent circumstances." *Id.* at 1018. Had the *Doe* Court not previously undergone the requisite constitutional analysis required by *Saucier* to clearly define the law, but had instead merely found no clearly established violation and ended its analysis, the caseworker in *Michael C.* would have been granted qualified immunity and similar violations would have continued unchecked.

Other circuits have had similar success under *Saucier*, as well. In *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002), the Ninth Circuit established that a police officer's unnecessary use of a drawn gun to threaten a civilian was a Fourth Amendment violation. The *Robinson* Court then granted qualified immunity to the officers in question, as the law was not clearly established at the time. Following this established right as articulated in *Robinson*, in *Hepner v. Balaam*, 2007 U.S. Dist. LEXIS 50495 (D. Nev. July 10, 2007), the District Court for the District of Nevada refused to grant qualified immunity to police officers who had unnecessarily drawn their guns on a civilian at a traffic stop. The District Court stated that "[g]iven the Ninth Circuit's opinion in *Robinson*, we think it was clearly established in 2003 that pointing weapons at unarmed suspects after determining that they were not armed would violate the suspects' constitutional rights." *Id.* at 16.

Some have raised concerns that *Saucier* will lead to non-appealable constitutional mistakes when an

erroneous decision is made regarding the constitutionality of a claimed right and immunity is subsequently granted. This, in theory, would result in "chill[ing] borderline but legal official conduct" on the part of government officials. Brief for the Texas Ass'n. of School Boards as Amicus Curiae Supporting Respondents at 3, *Pearson v. Callahan*, No. 07-751 (Docketed Dec. 6, 2007). Such concern does not suffice as a reason to overturn *Saucier* for two reasons.

First, if officials are sued for behavior that they desire to continue, they have an incentive to appeal or cross-appeal, as exemplified in *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004). Amicus would even support a rule exempting *Saucier* cases from the general prohibition against appeal by a victorious party. *See Bunting v. Mellen*, 541 U.S. 1019 (2004) (Scalia, J., dissenting).

Second, the criticism of *Saucier* regarding split-prong unreviewability is based on a desire to avoid a situation where an erroneous state of the law persists without possibility of correction. Yet precisely this situation would present itself if *Saucier* were overruled and the harm would be much more egregious. As before, it would become practically impossible to reach the constitutional merits in several classes of constitutional violations, leaving the law unclear and rendering qualified immunity an unintended shield for repeated violations of civil rights by government lawbreakers. The legal landscape without *Saucier* would be far worse than that under *Saucier* with appropriate appellate rule modifications. Rather than

erroneous constitutional law propagated only when courts made incorrect, unappealed decisions about borderline government behavior, whole groups of civil rights would lie effectively unprotected and unenforceable due to lack of judicial elaboration of the law.

Saucier additionally mitigates the harm caused by incorrect qualified immunity decisions. In *Hope v. Pelzer*, 536 U.S. 730 (2002), for example, the magistrate and district courts never considered the constitutionality of the official conduct in question. Instead, they simply found that the prison guards, who had tied Hope to a hitching post and "made him take off his shirt, [where] he remained shirtless all day while the sun burned his skin," *id.* at 734-35, were due qualified immunity based on the "clearly established" test. The Circuit Court, however, though upholding qualified immunity, properly adhered to *Saucier*'s fixed-order analysis and declared the guards' behavior a violation of the Eighth Amendment, clearly establishing the applicable law. Thus, while the Court erroneously upheld qualified immunity, *Saucier*'s order of analysis ensured that future abuses would not go unrectified even had this Court not granted *certiorari*. As this Court cannot review every erroneous award of qualified immunity by the lower courts, the importance of *Saucier*'s function in mitigating such errors and promoting judicial efficiency cannot be overstated.

Without *Saucier*, judges could be tempted to supplant the rule of law with their own policy choices. The two-step approach secures for every American

the rigid application of the rule of law, regardless of the policy preferences of a particular judge or set of judges. When a court must articulate and define the scope of the inalienable right violated in a case, the court has far less room to diverge into a preferred public policy position. Certainly, there is no talisman to ward off all such departures from the rule of law, but such mandatory transparency serves an important role in protecting the inalienable rights secured and preserved at great cost for more than two centuries.

II. There are alternatives to overturning *Saucier* that alleviate the Court's likely concerns while preventing unnecessary hindrance to elaboration of the law.

Should this Court nonetheless find that *Saucier* places too great a burden on the lower courts, there are modest modifications to *Saucier*'s fixed-order analysis that would satisfy any likely objections to its continued employment. *Saucier* need not be overruled altogether.

Amici have argued that *Saucier*'s two-step rule "requires constitutional decisionmaking without sufficient argument or record evidence." Brief for the States of Illinois, et al., as Amicus Curiae Supporting Respondents at 19, *Pearson v. Callahan,* No. 07-751 (Docketed Dec. 6, 2007). This concern is easily resolved by the addition of a heightened pleading standard for all cases involving qualified immunity

where an official is being sued in his individual capacity. Such a heightened standard already has been adopted by the Fifth Circuit, as articulated in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), and *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995). To further the utility of this heightened standard the Court could allow plaintiffs to waive *Saucier*'s requirement that the Court determine the constitutionality of the claimed right before ruling on qualified immunity. If after notice and opportunity to amend, a plaintiff fails to meet the higher pleading standard, or fails to brief the required constitutional issues, such failure would constitute waiver. A heightened pleading standard adhering to these guidelines would ensure that judges have sufficient briefing and evidence to make an informed decision on any constitutional issues while allowing plaintiffs the opportunity to bypass this requirement if they find it to be unessential to their case.

Additionally, should this Court find that it would alleviate real or perceived problems with the *Saucier* test, Amicus would support the second modification suggested by Petitioners that Fourth Amendment claims involving the fruit-of-the-poisonous-tree doctrine be exempted from the first prong of the *Saucier* test. Brief for Petitioners at 57-60, *Pearson v. Callahan*, No. 07-751 (Docketed Dec. 6, 2007). Although "the *Saucier* rule is quite important to the development of [Fourth Amendment] law in areas that do not arise in motions to suppress," *id.* at 59, poisonous-tree situations have ample opportunities for litigation

in contexts that do not involve qualified immunity and do not depend on *Saucier* for elaboration of the law. This modification could greatly improve judicial efficiency without threatening the enforcement of civil rights and the rule of law.

III. *Saucier* serves the irreplaceable purpose of ensuring policy decisions regarding official misconduct are properly guarded by the legislature and not by the preferences of well-meaning judges.

The very purpose of Congress and other elected bodies is to make public policy decisions, such as enacting Section 1983, to enforce inalienable rights. Courts should not supplant such policy initiatives with their own preferences regarding the desirability to enforce the rule of law.

> "The members of the Legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society . . . [and so] they are more immediately the confidential guardians of their rights and liberties."[13]

As Thomas Jefferson expounded in a letter to Judge Spencer Roane:

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[13] THE FEDERALIST NO. 49, at 275 (Alexander Hamilton) (Benjamin Warner, ed., 1818).

> "our Constitution . . . intending to establish three departments, co-ordinate and independent that they might check and balance one another, it has given – according to this opinion – to one of them alone the right to prescribe rules for the government of the others; and to that one, too, which is unelected by and independent of the nation . . . The Constitution, on this hypothesis, is a mere thing of wax in the hands of the Judiciary which they may twist and shape into any form they please."[14]

Rufus King, signer of the Constitution, warned during the Constitutional Convention that "the judges must interpret the laws; they ought not be legislators." THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. I, 108 (Max Farrand ed., Yale University Press 1911), (from Rufus King's records of the Convention from Monday, June 4, 1787).[15]

It is the role of courts to enforce the laws, including the inalienable rights secured by the Constitution, because Congress made a public policy decision to enact Section 1983 to require such enforcement.

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[14] THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON, VOL. XV, 215 (Albert Ellery Bergh ed., Thomas Jefferson Memorial Association 1904) (Letter from Thomas Jefferson to Judge Spencer Roane, Sept. 6, 1819).

[15] Alexander Hamilton explained in FEDERALIST NO. 81, "there is not a syllable in the plan [Constitution] which directly empowers the national courts to construe the laws according to the spirit of the Constitution." THE FEDERALIST NO. 81, at 436 (Alexander Hamilton) (Benjamin Warner, ed., 1818).

Saucier secures judicial transparency and serves to prevent courts from deviating from their enforcement role into a public policy realm never intended for them. Congress enacts the laws, Congress enacted the procedural vehicles used to obtain justice in civil rights cases, and Congress is the proper vestige for policy decisions regarding the law. Courts should not be able to create a court-made rule in order to perpetually deprive citizens of the rights to which they are entitled under law, a law in fact passed specifically to allow for redress of actual constitutional violations.

When the people, through their elected representatives, choose to follow a policy of enforcing constitutional rights through the courts, such as enacting Section 1983, no court should dilute those rights by subverting the rule of law and avoiding the legal issue when a violation has taken place. Courts must not be given an opportunity to cloak their decisions in mystery by granting qualified immunity for these constitutional violations without the necessary analysis to prevent the next violation. Whether intended or not, the pre-*Saucier* approach runs specifically contrary to the legislative purposes of Section 1983 and leads to the subversion of the rule of law and continued violations of inalienable rights. *Saucier* is an appropriate and necessary buttress against any tendency to supplant judicial wisdom for the wisdom of the people and provides transparency for future cases.

Saucier is an important case that helps protect the speech, religious and civil rights of American citizens from lawless official behavior without compromising the qualified immunity of government officials who act in good faith. It has relieved much of the tension between the qualified immunity doctrine and the protection of basic civil rights, and if in a few types of cases it causes a slightly increased workload for the judiciary, such a discrepancy can be corrected with minor rule changes without gutting *Saucier* itself. *Saucier* serves as an important check on any judge who may be tempted to deviate from enforcing the law to pursue public policy initiatives. The *Saucier* transparency keeps courts honest, serves the noble goal of respecting our inalienable rights and prevents rampant and continued violations from continuing in perpetuity.

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that this Court should not overrule *Saucier v. Katz*. Courts require the *Saucier* transparency to adequately enforce the rule of law and respect the inalienable rights our Founding Fathers sacrificed so much to secure.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE, DWIGHT JENKINS, CLARK THOMAS, AND JEFFREY WRIGHT,
Petitioners,

v.

AFTON CALLAHAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether police officers are liable in damages for violating the Fourth Amendment's prohibition on unreasonable search and seizure when they arrest an individual inside his residence and conduct a search incident to arrest, after an informant, who had been invited into the residence by the arrestee for the purpose of purchasing a controlled substance, gave a prearranged signal to the officers indicating that he had just completed the illegal transaction.

2. Whether this Court should overrule its decision in *Saucier v. Katz*, 533 U.S. 194 (2001), recognizing the defense of qualified immunity in cases seeking damages for an allegedly unreasonable search and seizure, and directing courts to consider the merits of the plaintiff's constitutional claim before turning to a proffered immunity defense.

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INTEREST OF THE *AMICI CURIAE*

Amici represent state and local governments and officials throughout the United States.[1] State and local governments are deeply involved in enforcement of the drug laws. For that reason, they have a substantial interest in opposing rules of law – like the one adopted by the court of appeals in this case – that impose unnecessary obstacles to law enforcement without meaningfully advancing privacy interests.

In addition, state and local governments and officials are frequently involved in litigation seeking damages for an alleged "deprivation of . . . rights, privileges and immunities secured by the Constitution and laws," 42 U.S.C. § 1983. This litigation has significant implications for the public fisc. Even when civil rights plaintiffs name only state and local employees as defendants, their employer usually bears the financial burden of defending the litigation and paying an adverse judgment.

Amici acknowledge the value of civil rights litigation in creating a financial incentive for public employers to take care that their employees comply with applicable constitutional standards. When, however, public employees make reasonable but ultimately erroneous judgments about the legality of their conduct, the doctrine of qualified immunity properly shields the taxpaying public from the finan-

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

cial consequences of liability in the absence of meaningful culpability.

STATEMENT

The Central Utah Narcotics Task Force is charged with investigating illegal drug use and sales. Pet. App. 31. On March 19, 2002, Brian Bartholomew, who became an informant for the Task Force after having been charged with the unlawful possession of methamphetamine, informed Officer Jeffrey Whatcott that respondent Afton Callahan had arranged to sell Bartholomew methamphetamine later that day. Pet. App. 2, 31-32.

That evening, Bartholomew had between six and eight beers before arriving at respondent's residence at about 8:00 P.M. Pet. App. 2, 32. Once there, Bartholomew went inside and confirmed that respondent had methamphetamine available for sale, sampling the merchandise. Pet. App. 2, 32. Bartholomew then told respondent that he needed to obtain money to make his purchase, and left. Pet. App. 2-3, 32.

Bartholomew met with members of the Task Force at about 9:00 P.M., and told them that he would be able to buy a gram of methamphetamine for $100. Pet. App. 32-33. During the meeting, the officers learned that Bartholomew had been drinking and he appeared intoxicated, although Bartholomew did not disclose that he had also ingested methamphetamine. Pet. App. 3, 33. The officers supplied Bartholomew with coffee, and after concluding that he was capable of completing the planned purchase, they searched him, determined that he had no controlled substances on his person, gave him a marked $100 bill and a concealed electronic transmitter to monitor his conversations, and agreed on a signal

that he would give after completing the purchase. Pet. App. 3, 33.

The officers drove Bartholomew to respondent's trailer home, and respondent's daughter let him inside. Pet. App. 3, 33. Respondent then retrieved a large bag containing methamphetamine from his freezer and some small bags, and sold Bartholomew a gram of methamphetamine, which he put in one of the small bags. Pet. App. 3, 34. Bartholomew gave the arrest signal to the officers, who were monitoring the conversation and then entered the trailer through a porch door. Pet. App. 3, 34-35. In the enclosed porch, the officers encountered Bartholomew, respondent, and two other persons, and saw respondent drop a plastic bag which they later determined contained methamphetamine. Pet. App. 3, 35. The officers then conducted a protective sweep of the premises. Pet. App. 4, 35-36. In addition to the bag of methamphetamine, the officers recovered the marked bill from respondent, a small bag containing methamphetamine from Bartholomew, and found drug syringes in the residence. Pet. App. 4, 36.

Respondent was charged with the unlawful possession and distribution of methamphetamine. Pet. App. 4, 37. The trial court concluded that the warrantless arrest and search was supported by exigent circumstances, but the Utah Court of Appeals disagreed and vacated respondent's conviction. *See State v. Callahan*, 93 P.3d 103 (Utah Ct. App. 2004). Respondent then brought this section 1983 damages action. Pet. App. 4-5, 39.

In granting the officers' motion for summary judgment, the district court noted that other courts had adopted the "consent-once-removed" doctrine, which permits a warrantless entry by police officers

into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view. Pet. App. 47-51. The district court believed, however, that this doctrine was in tension with the intervening decision in *Georgia v. Randolph*, 547 U.S. 103 (2006). The court concluded that "the simplest approach is to assume that the Supreme Court will ultimately reject the [consent-once-removed] doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment." Pet. App. 53. The court then held at that the officers were entitled to qualified immunity because they could have reasonably believed that the consent-once-removed doctrine authorized their conduct. Pet. App. 53-56.

A divided court of appeals reversed. The majority rejected the consent-once-removed doctrine because "the person with authority to consent never consented to the entry of police into the house." Pet. App. 12. The majority also held that the officers were not entitled to qualified immunity because their actions did not fit into any established exception to the warrant requirement. Pet. App. 15-18. Judge Kelly dissented, reasoning that once a homeowner admits an undercover agent or informant who observes contraband in plain view, "any previously existent legitimate expectation of privacy is abandoned." Pet. App. 24. Judge Kelly also would have affirmed on qualified immunity grounds because three circuits had recognized the "consent-once-removed" doctrine prior to the search at issue. Pet. App. 28-29.

SUMMARY OF ARGUMENT

1. There is no dispute in this litigation about whether the officers had probable cause to arrest

respondent. Moreover, under the circumstances, it was virtually certain that contraband was to be found in the residence. Still, the court of appeals believed that even after Bartholomew had given the arrest signal, the Fourth Amendment obligated the officers to leave the area, prepare a warrant application, present it to a judicial officer, and only then enter the residence by executing the warrant. Such extraordinary inefficiency in law enforcement under circumstances in which criminal drugs are virtually certain to be found in a residence – at least if the authorities enter with alacrity – is not mandated by the Fourth Amendment.

The Fourth Amendment's text does not require a warrant before the authorities enter a home; it requires only that such warrantless searches be reasonable. To be sure, it is frequently reasonable in the constitutional sense to require a warrant prior to entry of a home, but this is not invariably so.

To assess reasonableness, the Court weighs the extent to which a search or seizure intrudes on legitimate expectations of privacy against the legitimate governmental interests at stake. When an undercover officer or informant has entered a residence with the owner's consent and observed contraband in plain view, the privacy interests of the owner have already been compromised. Conversely, the governmental interests in an immediate arrest are compelling. When the presence of contraband is virtually certain, requiring the police to leave, obtain a warrant, and only later return to execute the warrant, hoping that the contraband and offender remain inside, injects needless inefficiency into the enforcement of the drug laws.

2. At a minimum, the officers were entitled to qualified immunity, which shields officials from suit unless they violate clearly established law. The court of appeals' majority acknowledged that prior to the search at least one other circuit had squarely held that a warrantless entry under circumstances indistinguishable from those present here comports with the Fourth Amendment; the dissent identified three circuits that had sanctioned such an entry. Given these contrasting judicial views, it is obvious that the officers violated no clearly established constitutional rule.

3. This Court has invited reconsideration of the question whether the decision in *Saucier v. Katz*, 533 U.S. 194 (2001), which directs courts to consider the merits of a Fourth Amendment claim before addressing a defense of qualified immunity. At first blush, it may seem anomalous that the defense of qualified immunity, which asks whether a public official sued for the performance of his official duties acted reasonably, should apply to a case alleging unreasonable search and seizure – both the merits and immunity might seem to turn on the same standard of reasonableness. It might also seem that deciding the merits of a constitutional claim before considering an immunity defense results in unnecessary constitutional adjudication. These seeming anomalies, however, are amply justified by the purposes of qualified immunity. Qualified immunity is recognized because it prevents the threat of liability from inducing public employees to exercise excessive caution when performing their duties. *Saucier v. Katz* is faithful to this objective.

Qualified immunity is properly applied to Fourth Amendment litigation because the burden of liability

is not fairly imposed when law enforcement officials violate no clearly established right, but merely fail to anticipate the manner in which Fourth Amendment law will evolve. When, moreover, courts consider the merits of a constitutional claim before reaching an immunity defense, they are able to articulate evolving constitutional standards, thereby obligating States and municipalities and their officials to hew to those standards in the future. If courts frequently declined to reach the merits prior to considering immunity, the development of constitutional law might be unduly inhibited as cases presenting novel constitutional issues were rejected not because of the claim's merits, but because no clearly established right had been violated. A rule that gave courts broad discretion to bypass the merits, moreover, would make litigation more complex and unpredictable, leading to precisely the kind of burdensome and expensive litigation that qualified immunity is intended to preclude. Only on a showing of unusually powerful prudential considerations should a court bypass the merits and go straight to a proffered immunity defense.

ARGUMENT

Under the approach to qualified immunity that this Court has taken for nearly two decades, the judgment below should not stand. The conduct of the police officers was consistent with the Fourth Amendment, and in any event was shielded by qualified immunity. The Court, however, has invited reconsideration of whether this approach to immunity should be repudiated, and *Saucier v. Katz*, 533 U.S. 194 (2001), overruled.

Radical restructuring of the law of qualified immunity is unwarranted and inconsistent with the

policies articulated in the Court's qualified immunity jurisprudence. The Court's approach in *Saucier* ensures that qualified immunity does not stifle the development of constitutional law, while shielding the taxpayers from the type of financial burden that this Court has held is not properly imposed in section 1983 litigation.

I. THE OFFICERS ARE NOT LIABLE FOR AN UNREASONABLE SEARCH AND SEIZURE BY ENTERING RESPONDENT'S HOME AFTER THE INFORMANT HAD CONFIRMED THAT IT CONTAINED CONTRABAND.

Under either substantive Fourth Amendment law or the defense of qualified immunity, the officers are not liable for entering respondent's residence once Bartholomew had confirmed that he had just purchased contraband there.

A. The Officers' Conduct Did Not Violate the Fourth Amendment's Prohibition On Unreasonable Search and Seizure.

The Fourth Amendment contains specific rules governing warrants, but the only requirement governing warrantless search and seizure is that it be reasonable:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment's special focus on warrants was no accident. Because of the broad and generally unreviewable authority that warrants conferred on those who executed them, warrants were of special concern to the Framers, while warrantless search and seizure, in contrast, could be assessed on an individualized basis for reasonableness. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669-71 (1995) (O'Connor, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 581-82 (1991) (Scalia, J., concurring in the judgment); *United States v. Leon*, 468 U.S. 897, 970-72 (1984) (Stevens, J., dissenting). Thus, when it comes to warrantless search and seizure, "[t]he touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). *Accord, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977).

When assessing reasonableness, the Court "look[s] to the statutes and the common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 128 S. Ct. 1598, 1602 (2008). *Accord, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Wyoming v. Houghten*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). In this case, however, framing-era practice provides little guidance. There is no claim that the officers lacked probable cause to arrest respondent on a felony charge of unlawful distribution of methamphetamine at the time they entered the trailer.[2] This

[2] Distribution and possession with intent to distribute of a schedule II controlled substance is a felony under Utah law. *See* Utah Stat. § 58-37-8(1). Methamphetamine is a schedule II

Court has previously surveyed framing-era law and found that it supplies no clear guidance on whether a warrant was required to arrest an individual in his residence when there is probable cause to believe that he had committed a felony. *See Payton v. New York*, 445 U.S. 573, 592-98 (1980).[3]

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controlled substance. *See id.* § 58-37-4(b)(iii)(B). Respondent's failure to contest the existence of probable cause to arrest is understandable. It has long been settled that "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (parentheses in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). It is equally settled that information from an informant that a suspect will engage in unlawful activity, once fairly corroborated by subsequent investigation, supplies probable cause. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 241-45 (1983). In *Draper v. United States*, 358 U.S. 307 (1958), for example, an informant told a federal agent that Draper would arrive in Chicago on a train from Denver on one of two days with heroin in his possession. *See id.* at 309. The Court held that once the agent observed a man matching Draper's description emerge from the Denver train, there was probable cause to arrest and conduct a search incident to arrest. *See id.* at 312-14. With such corroboration, even information from an informant that lacks a history of providing reliable information will supply probable cause. *See Gates*, 462 U.S. at 243-44. In this case, given the information that Bartholomew had provided, the fact that he had been searched for drugs before entering the trailer and been given a marked bill, and then had given the arrest signal, knowing that the officers would instantly be in a position to verify whether he had in fact purchased methamphetamine, the officers plainly had probable cause to arrest respondent.

[3] The dissenters in *Payton* argued that there was no requirement for a warrant to make a felony arrest in the arrestee's home in framing-era jurisprudence. *See* 445 U.S. at 604-

"When history has not provided a conclusive answer, we have analyzed a search or seizure . . . 'by assessing, on the one hand, the degree to which it intrudes on an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Moore*, 128 S. Ct. at 1604 (quoting *Houghton*, 526 U.S. at 300). *Accord, e.g.*, *Atwater*, 532 U.S. at 346; *Acton*, 515 U.S. at 652-53. In light of the substantial privacy interests at stake, this Court has treated warrantless entry into the home as presumptively unreasonable. *See, e.g.*, *Payton*, 445 U.S. at 585-90. This rule, however, is not without qualification.

One instance in which the Fourth Amendment does not require a warrant is when an agent or informant is invited inside, even when acting in an undercover capacity. In *Lewis v. United States*, 385 U.S. 206 (1967), for example, Lewis invited an undercover agent into his home for the purpose of selling him marijuana. *See id.* at 207-08. While acknowledging that "the home is accorded the full range of Fourth Amendment protections," the Court nevertheless rejected Lewis's Fourth Amendment claim: "[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Id.* at 211.

Similarly, in *Hoffa v. United States*, 385 U.S. 293 (1966), the Court found that an undercover government informant's participation in conversations about a jury tampering scheme in Hoffa's hotel suite

14 (White, J., dissenting). On that view, one could make short work of respondent's Fourth Amendment claim.

did not violate the Fourth Amendment because "no interest legitimately protected by the Fourth Amendment is involved" when it comes to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. Indeed, "[i]t is well settled that when an individual voluntarily reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities . . . ." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984). An undercover agent or informant may even conceal a transmitter or recording device on his person because such a procedure compromises no interest protected by the Fourth Amendment. *See, e.g., United States v. White*, 401 U.S. 745, 748-54 (1971) (plurality opinion) (transmitter); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963) (recorder); *On Lee v. United States*, 343 U.S. 747, 753-54 (1952) (transmitter).

Thus, by virtue of Bartholomew's entirely proper conduct, by the time the officers entered respondent's home, respondent had effectively disclosed not only to Bartholomew but to the officers as well that he was using his home to sell contraband. In these circumstances, it is hard to understand how respondent's privacy interests would have been advanced by requiring the officers to leave, obtain a warrant, and then return – respondent had already compromised his privacy interests through his dealings with Bartholomew, and it is virtually certain that a warrant would issue under the circumstances.

When expectations of privacy ordinarily protected by the Fourth Amendment have already been compromised, the rationale for the warrant requirement disappears. In *Texas v. Brown*, 460 U.S. 730 (1983), for example, three Members of the Court

opined that when a police officer during a traffic stop observed a balloon in a vehicle under circumstances that made it virtually certain that the balloon contained contraband, no warrant was required to open the balloon. *See id.* at 750-51 (Stevens, J., concurring in the judgment). No other member of the Court expressed a different view; the other Justices found it unnecessary to consider whether a warrant was required to open the balloon. *See id.* at 743-44 (plurality opinion); *id.* at 746-47 (Powell, J., concurring in the judgment).[4]

Conversely, the governmental interests supporting a warrantless entry and immediate arrest here are substantial. Requiring officers to leave the premises, obtain a warrant, and then execute it, hoping that both the contraband and the suspect remain on the premises, injects needless inefficiency into law enforcement. Efficiency, moreover, is of no small concern to those involved in law enforcement. There is convincing evidence, for example, that increasing the size of the police force produces reductions in crime. *See* Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 Am. Econ. Rev. 270 (1997); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime: Reply*, 92 Am. Econ. Rev. 1244 (2002). Many state and local governments, however, lack the resources to increase the size of their police forces, and must instead look to achiev-

[4] When *Brown* was decided, the Fourth Amendment was thought to require a warrant to open a closed container even when found in a vehicle when the only location within the vehicle in which there was probable cause to believe contraband was present is the container. *See United States v. Ross*, 456 U.S. 798 (1982). This rule was later repudiated in *Acevedo*. *See* 500 U.S. at 579-80.

ing greater efficiency. But needless administrative hurdles to the enforcement of the drug laws are a substantial barrier to such efficiencies.[5]

What is more, imposing a warrant requirement in these circumstances would actually increase the likelihood that an informant like Bartholomew might mislead the officers about what had happened inside – a possibility that was minimized by an immediate entry that enabled the officers to confirm that Bartholomew had just bought methamphetamine. There is surely a substantial law enforcement interest in an immediate entry as a safeguard against unreliable informants.

When expectations of privacy have already been compromised and the law enforcement interests supporting an immediate search and seizure are great, the Fourth Amendment's requirement of reasonable-

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[5] The officers could have impounded the trailer and, had they coaxed respondent and the other occupants outside, detained them pending the issuance of a warrant. *See Illinois v. MacArthur*, 531 U.S. 326, 331-34 (2001). An effort to coax the occupants outside, however, might merely have alerted them to the investigation and risked the destruction of evidence, and, in any event, impoundment and detention would have required an even greater commitment of police resources. The officers might also have sought an anticipatory warrant before arriving at the trailer, although it is unclear whether such a warrant would have issued. An anticipatory warrant is proper only when "there is probable cause to believe the triggering condition *will occur*." *United States v. Grubb*, 547 U.S. 90, 97 (2006) (emphasis in original). Until the transmitted arrest signal, it is unclear that the officers had probable cause to believe respondent would violate the law, especially considering Bartholomew's evident intoxication and lack of a prior history of reliability. *See supra* note 3. In any event, requiring an anticipatory warrant in these circumstances would again inject needless inefficiency in the law.

ness does not require a warrant. In *Jacobsen*, for example, the employees of a private freight service observed a white powdery substance inside a damaged package. *See* 466 U.S. at 111. While acknowledging that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable," *id.* at 114 (footnote omitted), the Court held that the agents did not need a warrant to reopen the package: "The advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection, rather than in further infringing respondents' privacy." *Id.* at 119. *Cf. Lopez*, 373 U.S. at 439 ("Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.").

Here as well, it was virtually certain that the trailer contained contraband. Given the information Bartholomew had provided, the corroborating transmission from within the trailer, and Bartholomew's knowledge that within moments the Task Force would be in a position to see for themselves, respondent's rapidly vanishing expectation of privacy with respect to the contraband in plain view in his residence surely pales in comparison to the law enforcement interests in making an immediate arrest and search incident to that arrest.[6] Accordingly, the

[6] Because, as we explain above, there was probable cause to arrest respondent, the Fourth Amendment also permitted a search of respondent and the immediately surrounding area, *see Chimel v. California*, 395 U.S. 752, 762-63 (1969), a protective sweep of the residence, *see Maryland v. Buie*, 494 U.S. 325, 334-

officers' warrantless entry comported with the Fourth Amendment.

Our submission does not rest on any notion of respondent's consent to the officers' entry. The scope and validity of consent is judged by the ordinary social understandings that surround entry into the residence of another. *See Randolph*, 547 U.S. at 113-17. While respondent consented to Bartholomew's entry into his home, we do not claim that it is commonly understood that consent to an invited guest's entry implies a corresponding consent to anyone else the guest may summon, including the authorities. But, as Judge Kelly noted in his dissenting opinion below, "[t]he name 'consent once removed' is something of a misnomer . . . ." Pet. App. 22. The officers' entry into respondent's trailer was not based on his consent, but rather was constitutionally reasonable in light of what respondent had already disclosed to Bartholomew and, through him, to the Task Force itself, coupled with the governmental interests supporting respondent's immediate arrest.

To be sure, the arrest and ensuing search and seizure occurred in respondent's home, but "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Once respondent had effectively announced to the Task Force that he was dealing methamphetamine from his home, his remaining privacy interests were not sufficiently substantial to require the officers to

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37 (1990), and seizure of contraband and other evidence of a crime in plain view, *see Horton v. California*, 496 U.S. 128, 133-42 (1990). To the extent that respondent claims the officers exceeded the permissible scope of these doctrines, such a claim would presumably remain open on remand from this Court's decision.

refrain from making an immediate arrest and search incident thereto in order to comply with the constitutional requirement of reasonableness.

B. The Officers Are Entitled to Qualified Immunity.

The doctrine of qualified immunity shields public officials from damages liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Accord, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1983). Thus, "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brousseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

In this case, as the court of appeals' majority acknowledged, at the time of respondent's arrest, the Seventh Circuit had already approved of the "consent-once-removed" doctrine on facts indistinguishable to those present here. *See* Pet. App. 16-17. Judge Kelly, in dissent, counted three circuits that had approved the doctrine in terms that arguably reached this case, and added that no court, including the Tenth Circuit, had condemned the doctrine. *See id.* at 28-29. In the face of what was, at worst, conflicting authority, qualified immunity is surely available.

In *Wilson v. Layne*, for example, after holding that the Fourth Amendment's prohibition on unreasonable search and seizure forbids authorities from bringing media representatives with them into an

arrestee's home when executing an arrest warrant, *see* 526 U.S. at 609-14, this Court then held that the officers were entitled to qualified immunity because, at the time of the search and even later, courts had disagreed about the constitutionality of the practice. *See id.* at 615-18. The Court observed: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 618. The same is true here.

For its part, the court of appeals' majority contended that the general rule requiring a warrant was well settled, and neither it nor this Court had yet articulated an exception to the warrant requirement applicable to this case. *See* Pet. App. 15-18. This view is little different from the approach this Court rejected in *Anderson v. Creighton*. In that case, the court of appeals denied qualified immunity for a warrantless entry that a federal agent believed was justified by exigent circumstances on the ground that the requirement of a warrant absent exigent circumstances to enter a home had been clearly established. *See* 483 U.S. at 637-38. This Court disagreed: "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. Here, similarly, the officers could have reasonably believed that their conduct fell into another exception to the warrant requirement for which there was reasonable support in the law.

The court of appeals' majority also relied on *Groh v. Ramirez*, 540 U.S. 551 (2004), in which federal

agents executed a search warrant that did not specify the items they were authorized to seize, and later argued that they could have reasonably relied on the specification in the warrant application to comply with the Fourth Amendment's particularity requirement. *See id.* at 554-56. This Court denied the agents qualified immunity because the warrant made no effort to comply with the express particularity requirement of the Fourth Amendment's Warrant Clause. *See id.* at 563-65. Here, however, the Fourth Amendment's more general reasonableness requirement is at issue, and unless our submission above (or the view of at least the Seventh Circuit) is thought utterly absurd, an officer could reasonably have thought the conduct at issue was constitutional.

II. QUALIFIED IMMUNITY IS PROPERLY APPLIED TO FOURTH AMENDMENT CLAIMS AND SHOULD ORDINARILY BE REACHED AFTER CONSIDERATION OF THEIR MERITS.

When it granted certiorari, the Court asked the parties to consider whether the decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled. This question raises at least two distinct issues.

On the one hand, the Court could revisit the contention of the principal separate opinion in *Saucier* that qualified immunity should not be applied to claims of unreasonable search and seizure because the immunity inquiry duplicates the substantive constitutional standard of reasonableness. *See id.* at 213-14 (Ginsburg, J., concurring in the judgment). On the other, the Court might reconsider its direction to lower courts in *Saucier* that the merits of the constitutional claim should be considered before turning to a proffered immunity defense. *See id.* at

200-01. A number of Justices have expressed concern that this approach results in unnecessary constitutional adjudication, and may as a practical matter insulate a lower court's decision on the merits from this Court's review. *See, e.g., Morse v. Frederick*, 127 S. Ct. 2618, 2641-42 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring); *Brousseau*, 543 U.S. at 201-02 (Breyer, J., concurring); *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring in the judgment).

Considered in light of the purposes of qualified immunity, these criticisms of *Saucier* are wanting in the vast majority of cases. Accordingly, we turn first to the policies underlying qualified immunity, and then consider the attacks on *Saucier* in light of them.

A. Qualified Immunity Protects Governmental Defendants Against the Threat of Overdeterrence and Unwarranted Invasions of the Public Fisc.

In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court explained that when section 1983 was enacted, the common law recognized an immunity from liability when police reasonably and in good faith believe that their actions are lawful, and for that reason held that a similarly qualified immunity should be recognized under section 1983. *See id.* at 553-55. Subsequently, however, this historical approach was overtaken by a functional one; in *Harlow*, the Court repudiated the good faith prong of the common law immunity defense on the ground that it failed to protect public officials from the chilling effect of burdensome litigation and unanticipated liability. *See* 457 U.S. at 814-

20. Thus, immunity is now governed by functional considerations. *See Anderson*, 483 U.S. at 644-46.

To be sure, it is rarely the threat of personal liability that inhibits public employees in the performance of their duties. As Justice Breyer has observed, most public officials are indemnified for their legal costs. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (dissenting opinion). Indeed, by statute, policy, or collective bargaining agreement, indemnification is common in public employment. *See, e.g.*, Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 812, 819-20 (2007). This should be unsurprising; labor economics teaches that employers must offer sufficient compensation to account for the risk of liability that employees face and are likely to choose indemnification as the most efficient means of doing so. *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231, 1239-43 (1984). The ubiquity of indemnification, however, does not mean that the Court is wrong to believe that absent qualified immunity, damages awards have the potential to inhibit public officials in the performance of their duties.

As the Court has observed, public employers operate within a system of political accountability rather than the type of competitive market that gives private employers an incentive to make cost-justified investments in liability reduction. *See Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997). Still, public employers are sensitive to the threat of liability because damages awards impose a political cost by forcing public employers to divert scarce public resources from what they are likely to regard as politically op-

timal uses. *See* Rosenthal, *supra* at 831-43. Thus, public employers have a political incentive to take care that their employees do not court liability for which they will be indemnified.

Qualified immunity, in turn, minimizes the risk that the threat of liability will pressure on public employers to exercise excessive caution in the training and supervision of their employees. When the law is unsettled, additional training and supervision is likely to be of marginal utility, and unlimited liability would create an anomalous incentive for public employers to train their employees to avoid any legal risk – precisely the type of overdeterrence that qualified immunity aims to prevent. Qualified immunity eliminates this anomaly by confining liability to violations of clearly established rights – the kind of violations that a public employer should be encouraged to anticipate and prevent. *See* John C. Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 Mich. L. Rev. 82, 93-103 (1989); Rosenthal, *supra* at 856-60. By operating in this fashion, qualified immunity also achieves another of the policies that this Court has identified in section 1983 – the congressional objective of limiting liability so as not to burden the taxpayers with financial consequences of every legal wrong committed by a public employee. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978). Proposals for reform in qualified immunity should be assessed in light of these objectives; as the Court has repeatedly cautioned, qualified immunity doctrine should be fashioned in light of the functional objectives of the immunity. *See, e.g., Richardson*, 521 U.S. at 407-08; *Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *Forrester v. White*, 484 U.S. 219, 223-24 (1988); *Mitchell v. Forsythe*, 472 U.S. 511, 525-26 (1985).

B. Qualified Immunity Is Properly Applied to Allegations of Unreasonable Search and Seizure.

This Court has twice rejected arguments that qualified immunity is inappropriate in cases alleging unreasonable search and seizure. *See Saucier*, 533 U.S. at 203-07; *Anderson*, 483 U.S. at 643-44. This conclusion is faithful to the character of qualified immunity.

Fourth Amendment law is not merely an undifferentiated command of "reasonableness." As courts elaborate on the constitutional standard of reasonableness, the standard acquires greater clarity; as the Court has explained, "the legal rules for probable cause and reasonable suspicion acquire content only through application." *Ornelas v. United States*, 517 U.S. 690, 697 (1996). For this reason, in *Ornelas*, the Court held that determinations of probable cause and reasonable suspicion should be subject to independent appellate review "to unify precedent and . . . come closer to providing law enforcement officials with a defined 'set of rules . . . .'" *Id.* at 697-98 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)).

Accordingly, what may seem reasonable in the abstract will change after an authoritative ruling on point. In many cases, "because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multifaceted, 'one determination will seldom be a useful precedent for another.'" *Ornelas*, 517 U.S. at 698 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983)). In such cases, "law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determina-

tions in other areas of law." *Anderson*, 483 U.S. at 644. But sometimes, prior law may make the constitutionality of a contemplated search clear one way or another. *See Ornelas*, 517 U.S. at 698. As we explain above, qualified immunity properly places the burden on public employers to train their employees to respect these clearly established rights, without imposing liability when the constitutional standard of reasonableness, at least on a particular set of facts, has yet to be authoritatively explicated.

In *Wilson v. Layne*, for example, as the Court acknowledged, there was some support for the view that permitting the media to accompany officers executing warrants was constitutionally reasonable because it might enhance the deterrent effect of such operations and public confidence in the authorities. *See* 526 U.S. at 612-13. Once this Court had condemned the practice, however, public employers were on notice that they must train their employees to respect this now-established right to be free from what this Court had held was an unreasonable search. As we explain above, qualified immunity properly permits liability after such an authoritative elaboration on the constitutional standard of reasonableness. Prior to an authoritative adjudication, however, the constitutional standard of reasonableness will often be unclear, and for that reason, an award of damages will be unjustified. Thus, the defense of qualified immunity is properly recognized on allegations of a constitutionally unreasonable search or seizure for cases in which the constitutional standard of reasonableness remains in doubt to minimize the threat of overdeterrence that public employers would otherwise confront.

C. A Court Should Ordinarily Consider the Merits Before Reaching a Qualified Immunity Defense.

In a line of cases predating *Saucier* by a decade, involving a wide variety of constitutional claims, this Court has indicated that a court should consider the merits before turning to the immunity defense. *See, e.g., Scott*, 127 S. Ct. at 1774 (Fourth Amendment claim based on high-speed police pursuit); *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (cruel and unusual punishment claim based on prison discipline); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999) (due process claim based on search of attorney); *County of Sacramento v. Lewis*, 523 U.S. at 841 n.3 (due process claim based on high-speech police pursuit); *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991) (First Amendment retaliation claim). Before *Saucier*, however, the Court had described beginning with the merits as "the better approach," *County of Sacramento v. Lewis*, 523 U.S. at 841 n.5, while in *Saucier*, the Court stated more categorically that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged . . . ." 533 U.S. at 200.

Although consideration of the merits of a constitutional claim in a case in which an immunity defense proves dispositive might seem to be unnecessary constitutional adjudication, the admonition against unnecessary constitutional adjudication is a consideration of prudence, not an inflexible command. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7-8 (1993). Two prudential considerations militate in favor of consideration of merits in qualified immunity litigation.

First, the nature of the immunity defense means that it is frequently difficult to avoid constitutional

adjudication even on the question of immunity. After all, "even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted." *County of Sacramento v. Lewis*, 523 U.S. at 841 n.5. Second, if courts routinely confined themselves to the question whether the defendants violated clearly established rights, "standards of official conduct would tend to remain uncertain, to the detriment of both officials and individuals." *Id.* Thus, consideration of the merits "is 'necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.'" *Scott*, 127 S. Ct. at 1774 (quoting *Saucier*, 533 U.S. at 201) (brackets in original)).[7]

These prudential considerations are weighty. Constitutional principles might never be clarified if every novel claim were met with the answer that it involved no violation of clearly established right. While some novel claims might be vindicated in cases seeking injunctive relief or suppression evidence under the exclusionary rule, or attacking a municipal custom, policy, or practice, there are substantial limitations on those remedies.

Injunctive relief, for example, is only proper when the plaintiff faces a credible threat of future injury from a challenged practice. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-10 (1983). As for the

[7] This is also the primary ground advanced by the academic defenders of the merits-first approach. *See, e.g.*, John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 411-18 (1999); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 42-50 (2002); Michael L. Wells, *The Order of Battle in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1554-68 (2007).

exclusionary rule, it applies only to the admission of evidence in criminal litigation. *See, e.g., Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998). It offers no remedy for constitutional violations that do not produce evidence that the prosecution seeks to have admitted in a criminal case. For example, *Siegert v. Gilley*, in which the Court first articulated the merits-first rule, involved a claim of defamation in retaliation for the exercise of First Amendment rights – a situation in which the exclusionary rule could offer the plaintiff nothing.

Moreover, even in criminal litigation involving the admissibility of evidence, when a court has authorized the recovery of evidence in a search warrant, exclusion of the evidence is considered an improper remedy even when the warrant is executed unconstitutionally. *See Hudson v. Michigan*, 547 U.S. 586, 590-99 (2006). Thus, given the limitations on the exclusionary remedy and the availability of a qualified immunity defense, it was only the merits-first rule that enabled the Court to resolve the constitutionality of media members accompanying officers who execute a warrant in *Wilson v. Layne*. As the Court has itself observed, often "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814.

In addition, although qualified immunity is not available in a damages action attacking a municipal custom, policy, or practice, *see Owen v. City of Independence*, 445 U.S. 622 (1980), in such cases "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at 405. Accordingly, in many cases it will

be difficult for plaintiffs to adduce the necessary proof for policy claims. What is more, such claims are unavailable against States, which cannot be sued under section 1983. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 65-71 (1989).

As we explain above, the purpose of qualified immunity is to preclude liability that could overdeter public officials and unjustifiably invade the public fisc, not to retard to development of constitutional law. The merits-first approach achieves the benefits of immunity without the cost of retarding the development of the law. As for the concern that merits rulings may be insulated from review by a successful immunity defense, if a merits holding of a lower court threatens to cause substantial disruption in the law, this Court surely remains free to grant review. *See Bunting v. Mellen*, 541 U.S. 1019, 1025 (2004) (Scalia, J., dissenting from denial of certiorari) ("The perception of unreviewability undermines adherence to the sequencing rule we . . . created" in *Saucier*.).

To be sure, the Court could relax the merits-first rule by affording lower courts discretion to bypass the merits in cases where development of applicable legal standards appears unnecessary. Such an approach, however, would make section 1983 litigation even more complex as the parties find it necessary to join issue on whether a decision on the merits is appropriate in addition to the other issues in the litigation. In such a regime, the plaintiff will still, of necessity, argue that the constitutional right it presses not only exists, but also overcomes a proffered immunity defense, making constitutional adjudication unavoidable. In *amici*'s experience, defense counsel will be reluctant to ignore the plaintiff's submission on this issue, and the defense will therefore litigate

not only the merits and immunity, but also the question whether the merits should be reached. Thus, relaxation of the merits-first rule would undermine the core objective of qualified immunity by making immunity litigation even more expensive and time-consuming for public officials. Equally unfortunate, the stack of briefs facing courts would become ever thicker and more complicated, as a new cottage industry of litigation develops over the standards for deciding whether to reach the merits in a given case.[8]

Moreover, to the extent that a rule permitting courts to bypass the merits makes it more difficult for civil rights plaintiffs to pursue novel claims, they will have greater reason to press custom, policy, or practice claims against local governments – claims as to which there is no qualified immunity. While policy claims may be straightforward when a statute or formal policy is challenged as unconstitutional, many

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[8] Petitioners suggest that it may be unnecessary to reach the merits in cases in which an exclusionary remedy would be available in related criminal litigation since the law can still develop through motions to suppress evidence. *See* Pet. Br. 58-60. As the division on the Court in *Hudson* makes evident, however, it will sometimes be difficult to tell whether exclusion would have been a proper remedy in a related criminal case, both because of uncertainty about the scope of the exclusionary rule and the other limitations on that remedy which, as this Court has observed, mean that a Fourth Amendment violation does not necessarily imply the invalidity of a conviction. *See Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994). Thus, when a criminal case was never brought, or dismissed without adjudication, it may be impossible to tell whether exclusion would have been an available remedy. The same is true of cases resolved by guilty pleas, which ordinarily will not bar a subsequent section 1983 action. *See Haring v. Prosise*, 462 U.S. 306, 316 (1983). Thus, petitioners' approach could also inject many complications into section 1983 litigation.

cases involve instead allegations that policymakers have exhibited deliberate indifference to the misconduct of public employees. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989). This type of claim, involving examination of how allegations of misconduct have been handled by policymakers over many years, is often enormously intrusive, time-consuming, and expensive to defend, even if the defense proves successful. Thus, local governments come under enormous pressure to settle these cases. The financial burden of a rule that would encourage plaintiffs to pursue such litigation as an alternative to actions against individual officials, accordingly, would again undermine the policies at the core of qualified immunity.

Finally, the merits-first rule has the virtue of logical coherence. After all, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' . . . is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232. Nor is it unusual to consider the merits before turning to the question whether a remedy may be had; this is the routine practice, for example, when undertaking harmless error analysis. As this Court has explained: "Harmless error analysis is triggered only *after* the reviewing court discovers that an error has been committed." *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (emphasis in original). Thus, the Court will routinely decide a constitutional question even as it acknowledges that the constitutional error it has identified may well prove harmless. *See, e.g., Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987).

For all these reasons, prudential considerations ordinarily favor the merits-first rule. To be sure, there will be some cases in which countervailing prudential considerations should permit courts to forego a consideration of the merits, such as when the record is sufficiently developed to permit resolution of immunity but not the merits, or when the merits pose some other extraordinary complication. None of the Court's precedents expressly consider such a situation; and in such a case, the prudential argument for an immediate immunity decision that will spare public officials the burden of litigation they are destined to win is powerful. In other cases, it will be patent that the action is barred by qualified immunity because the plaintiff is so obviously endeavoring to establish a new legal right. It has long been settled that federal courts lack jurisdiction to decide claims that are "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 536 (1974). Under this rule, plaintiffs with nothing but a frivolous claim for damages effectively seek an advisory opinion, and their cases are properly rejected without consideration of the merits.[9] Ab-

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[9] One commentator has argued that the merits-first approach violates the constitutional ban on advisory opinions. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847, 895-921 (2005). This view is difficult to defend. Absent a wholly frivolous request for damages, it cannot be fairly said that civil rights plaintiffs confronting even a strong qualified immunity defense seek only an advisory opinion; they are instead litigating a necessary step to their entitlement to damages. The Court quickly rejected a similar claim as it recognized a good-faith exception to the exclusionary rule while permitting the lower courts to consider the merits of a Fourth Amendment claim prior to the remedial question:

> Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly

sent a wholly frivolous claim for damages or particularly powerful prudential arguments against reaching the merits, however, the merits-first approach properly advances the policies underlying the defense of qualified immunity.

This case plainly cannot be regarded as frivolous; after all, this is a case that the court of appeals thought not merely substantial, but actually meritorious. As we explain above, that judgment should not stand, but the court of appeals' decision to reach the merits prior to the immunity defense reflects a sound regard for the proper development of constitutional law.

> raise live controversies which Art. III [of the Constitution] empowers federal courts to adjudicate. As cases addressing questions of good-faith immunity under 42 U.S.C. § 1983, and cases involving the harmless error doctrine make clear, courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases.
>
> If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue.

Leon, 468 U.S. at 924-25 (footnotes and internal citations omitted). For additional discussion, see Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733, 1797-806 (1991); Greabe, *supra* note 8, at 418-26.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE, DWIGHT JENKINS, CLARK THOMAS, AND JEFFREY WHATCOTT,
Petitioners,

v.

AFTON CALLAHAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether police officers may invoke "consent-once-removed" to enter an individual's home without a warrant after an undercover informant buys drugs inside?

2. Whether the officers who effected a warrantless entry in this case are entitled to qualified immunity?

3. Whether *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001) should be overruled?

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IN THE

Supreme Court of the United States

NO. 07-751

CORDELL PEARSON, *et al.*,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association working in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and due process for persons accused of crimes and other misconduct. NACDL has more than 12,800 members—joined by 94 affiliate organizations with 35,000 members—including criminal defense lawyers, active U.S. military defense counsel, and law professors committed

to preserving fairness within America's criminal justice system.

This case concerns whether multiple officers may enter the home without a warrant simply because the homeowner allowed a single informant into the home for a drug transaction. NACDL has a strong interest in ensuring proper application of Fourth Amendment principles in this context and in ensuring that the law accords appropriate respect for an individual's authority to exclude uninvited intrusion into the home. NACDL has appeared as *amicus curiae* in numerous Fourth Amendment cases in this Court. See, *e.g.*, *Georgia* v. *Randolph*, 547 U.S. 103 (2006); *Muehler* v. *Mena*, 544 U.S. 93 (2005); *Devenpeck* v. *Alford*, 543 U.S. 146 (2004); *Kyllo* v. *United States*, 533 U.S. 27 (2001).[1]

STATEMENT

1. The morning of March 19, 2002, Brian Bartholomew—a confidential informant working for the Central Utah Narcotics Task Force ("Task Force")—learned that respondent Afton Callahan was going to have methamphetamine for sale in his home that night. J.A. 114. Accordingly, at 10:30 a.m., Bartholomew called petitioner Detective Jeffrey Whatcott to apprise him of that information. *Ibid.* Whatcott told Bartholomew to confirm that Callahan had methamphetamine for sale and get back to him. Pet. Br. 5-6.

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[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

That day, Bartholomew finished work at around 5 p.m. and then drank "between six and eight" beers. J.A. 115. Shortly after 8:00 p.m., Bartholomew and a friend went to Callahan's home. J.A. 115-117. According to Bartholomew, Callahan showed him the methamphetamine and offered to sell him as much as he wanted. J.A. 117. After "tasting" the drugs, Bartholomew agreed to purchase a baggie for $100; Bartholomew said he would return with the money later. J.A. 117, 145.

Bartholomew then called petitioner Detective Dwight Jenkins to tell him he "had a deal going down." J.A. 118. At around 9:00 p.m., Bartholomew rode with Detective Whatcott to the Sheriff's office, where the Task Force was gathering. J.A. 52-53, 119. Although Bartholomew had been drinking heavily, the Task Force decided to go forward with a controlled buy after giving Bartholomew "six, seven, eight cups of coffee." J.A. 55, 119.

Some Task Force officers surveyed Callahan's home to determine the best points of entry. J.A. 56. Back at the Sheriff's office, Whatcott photocopied a $100 bill for identification, and then gave the bill to Bartholomew to purchase the drugs. J.A. 55, 58. Other officers searched Bartholomew to confirm that he was not carrying any contraband himself and "wired" him with a transmitter so that the officers could monitor and record the controlled buy from outside the house. J.A. 54, 153. Finally, Bartholomew told the officers that he would "play the drums" as a signal for them "to come in" when the deal was done. J.A. 120.

At around 11:00 p.m.—two hours after Bartholomew arrived at the Sheriff's office—petitioners Thomas and Jenkins (also Task Force members) drove Bartholomew to a location near Callahan's home. J.A. 61, 184. While officers monitored everything from outside, Bartholomew went inside the home, bought methamphetamine, and told Callahan that he wanted to "play the drums that

were on the porch." J.A. 64-65. At that point, several members of the Task Force stormed Callahan's home, ordering Callahan, Bartholomew, and the home's two other occupants to lie down on the ground. J.A. 189-191, 266. When the officers searched Callahan, they found the $100 bill they had given Bartholomew. J.A. 243-244. A later search of the home revealed additional baggies of methamphetamine and syringes. J.A. 70-71, 196.

At no point during the day—or in the two hours the Task Force used to plan the operation—did any member of the Task Force seek a warrant. J.A. 89.

2. Callahan was charged with possessing methamphetamine with intent to distribute it. Before trial, he moved to suppress the evidence discovered as a result of petitioners' warrantless entry into his home. J.A. 295-296. The trial court denied the motion, ruling that "exigent circumstances" justified the officers' warrantless entry. J.A. 302. Callahan then pled guilty to one count, reserving his right to appeal the trial court's ruling on the motion to suppress. J.A. 304-312.

On appeal, the State conceded that no exigent circumstances existed, arguing instead that the evidence was admissible under the inevitable discovery doctrine. J.A. 334-335. The Utah Court of Appeals agreed that "the Task Force entry was not justified under the doctrine of exigent circumstances," J.A. 334 n.2, and rejected the State's inevitable discovery argument as well, J.A. 339. "In view of the Task Force's adoption of a plan that included an illegal entry from the outset, we cannot, with any confidence, conclude that an independent, legal avenue for discovery was *ever* available." J.A. 338 (internal quotation marks omitted).

3. Callahan then brought this action under 42 U.S.C. § 1983 in the United States District Court for the District of Utah. Pet. App. 39-40. The district court granted

summary judgment for petitioners, focusing on "consent once removed" as petitioners' "strongest argument." *Id.* at 47. The district court described that doctrine as validating warrantless entry into the home where an undercover agent or informant enters with consent, establishes probable cause, and immediately summons help. *Id.* at 47-48. While noting that the doctrine had been adopted by three circuits, the district court "wonder[ed]" about its validity. *Id.* at 52. "[I]t seems a bit of a stretch," the court observed, to call the entry of multiple officers "'consensual'" where, as here, the homeowner merely invited a single individual into his home. *Ibid.* Although the district court assumed a constitutional violation for purposes of its analysis, the court granted petitioners qualified immunity. *Id.* at 53. The invalidity of entry under the consent-once-removed doctrine, the court declared, was not "clearly established" under these facts at the time the officers acted. *Id.* at 55-56.

4. The court of appeals reversed. Pet. App. 1-18. Turning first to whether there was a constitutional violation, the court of appeals emphasized that, in view of the home's centrality to privacy and personal security, courts "continually have viewed the warrantless entry into the home as presumptively unreasonable." *Id.* at 8. This particular entry, the court of appeals held, did not fall within the "carefully defined set of exceptions" to the warrant requirement. *Id.* at 9 (internal quotation marks omitted).

The court of appeals noted that it had previously authorized warrantless entry by additional officers to assist an undercover officer in making an arrest, but refused to extend that holding to permit petitioners' warrantless entry. Pet. App. 11. "[T]he person with authority to consent never consented to the entry of police into the house." *Id.* at 12. The court of appeals also rejected petitioners' claim of qualified immunity, noting that "the

Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Id.* at 17. Here, neither of those exceptions even arguably validated warrantless entry. *Ibid.*

Judge Kelly dissented. Judge Kelly would have held that the warrantless entry did not violate the Fourth Amendment. Pet. App. 26. Alternatively, Judge Kelly would have granted qualified immunity, holding that "the right at issue was not clearly established" when petitioners conducted their search. *Id.* at 29.

SUMMARY OF ARGUMENT

I. This Court has long required that, absent exigency or consent, officers obtain a warrant before entering the home. Callahan's decision to admit a confidential informant into his home did not excuse petitioners from getting a warrant before barging inside.

A. In deciding whether an intrusion violates the Fourth Amendment, this Court determines whether the affected individual had a "reasonable expectation of privacy" by examining sources such as tort law, property law, and shared social understandings. Those sources all make clear that, when a homeowner invites a single individual into the home, that does not represent consent for uninvited visitors to enter as well. The law and society have long respected and vigorously enforced the expectation that—because an invitation to enter the home extends only to the person who receives it, and the invitation cannot be transferred or extended—the home remains immune from entry by anyone who has not been invited inside.

B. The United States errs in urging that the uninvited entry of additional officers into the home does not meaningfully intrude on privacy if a government infor-

mant is already in the home. Uninvited "*physical entry of the home* is the chief evil against which * * * the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980) (emphasis added) (internal quotation marks and citation omitted). The entry of multiple police officers into the home, without invitation and without a warrant, unquestionably represents a meaningful intrusion on Fourth Amendment rights. The history of the Fourth Amendment makes that clear. In terms of privacy, there is an enormous difference between an invitee entering the home (potentially recounting his observations to others) and multiple others storming in uninvited.

C. The defense of consent-once-removed offered here does not make sense in light of that doctrine's supposed boundaries. If allowing an informant into the home "waived" the homeowner's Fourth Amendment rights or so diminished his privacy expectations as to allow entry by others, there would be no reason for the doctrine to require probable cause, or to require a request for assistance from the informant. Entry would be lawful without those elements based on the informant's presence alone.

II. Qualified immunity was properly denied. Petitioners' planned warrantless entry into Callahan's home was unlawful under settled principles and clearly contrary to centuries of legal and social tradition. No reasonable officer could have thought otherwise. Even accepting *arguendo* the consent-once-removed doctrine, that doctrine requires a request for assistance by the informant inside the home. No such request was issued here.

III. The Court should modify the two-step inquiry mandated by *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). The first step, determining whether a constitutional violation occurred under the facts of the case, often clarifies and guides the later inquiry into whether the law was

"clearly established." But lower courts should not be required to complete the first step in every case, where doing so would be unworkable, inefficient, or contrary to the purposes of qualified immunity. Because this Court has a unique duty to issue thorough opinions that offer guidance and enhance consistency in the law, this Court should often utilize *Saucier*'s two-step approach in formulating its opinions. Following that two-step approach is particularly appropriate in this case.

ARGUMENT

For petitioners, most everything leading up to their arrest of respondent Callahan went as planned. The morning of the day of arrest, a confidential informant told Detective Whatcott that Callahan would be distributing methamphetamine. J.A. 114. That night, the officers arranged for the informant to make a controlled buy at Callahan's home. Some members of the Task Force surveyed Callahan's home to "look[] for places they could get into the trailer * * * as quickly as possible after the deal was done." J.A. 56. Meanwhile, at the Sheriff's office, other officers wired the informant with a remote listening device, J.A. 54, searched him for contraband, J.A. 183, and gave him a $100 bill (after photocopying it for identification) so he could make the drug purchase, J.A. 58. Task Force members then drove the informant to Callahan's neighborhood and waited as Callahan's daughter let the informant into the home. J.A. 184-185. When the informant gave a signal that the deal was done, officers stormed Callahan's home, arrested those present, and searched the premises. J.A. 65-66, 195.

It was a textbook operation, with a textbook mistake—the officers entered Callahan's home without a warrant. J.A. 89. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v.

New York, 445 U.S. 573, 586 (1980) (citation omitted). Here, petitioners' plan from "the outset" called for them to enter Callahan's home. J.A. 338. In this Court, petitioners do not contend that there was even an arguable exigency that would have permitted warrantless entry. Nor do they claim that Callahan voluntarily allowed them inside.

Instead, petitioners and their *amici* contend that it was permissible for officers to storm into Callahan's home without a warrant because Callahan had voluntarily allowed *the confidential informant* to enter. Invoking the so-called "consent-once-removed" doctrine, they urge that, by inviting one informant inside, Callahan also unwittingly consented to (or forfeited any protection *vis-à-vis*) the later entry of multiple, armed police officers. In essence, they claim that a homeowner's decision to license a single individual to join him in his home gives the police a free pass to raid the home without a warrant.

That theory cannot be reconciled with the longstanding legal and social understandings this Court consults when deciding Fourth Amendment issues. From Blackstone to Emily Post, from historical tort principles to the basics of property law, it has long been understood that consenting to a single person's entry is not—and cannot—be taken as consent for others to enter as well. In society and the law alike, a license to enter has always been of such a personal nature that it cannot be transferred to another, much less expanded to include a band of unlicensed, uninvited, and unwelcome guests. Nowhere is that principle more dearly held and rigorously enforced than when it comes to the most private of sanctuaries—the home. The law and social custom thus have long respected and enforced the homeowner's expectation that, even where he invites guests into the home, the sanctity of his home will not be physically invaded by those he has not invited.

I. The Warrantless Police Entry Violated The Fourth Amendment

A. The Notion Of "Consent-Once-Removed" Cannot Be Reconciled With Our Legal Tradition Or Shared Values

It is well established that law enforcement officers may conduct "a valid warrantless entry and search of premises" when the homeowner actually consents to their entry. *Georgia* v. *Randolph*, 547 U.S. 103, 106 (2006). Invoking "consent-once-removed," petitioners and their *amici* urge that, when a citizen consents to a single informant's entry into his home, that somehow licenses multiple officers to force their way inside later on. Pet. Br. 20-28; U.S. Br. 12-18.[2] Petitioners and their *amici* offer a grab-bag of rationalizations for that result. Petitioners posit that, when a homeowner invites an informant into his home, he "waives" his Fourth Amendment objection to the subsequent entry of multiple police officers. Pet. Br. 20-24, 39-41. Alternately, they rely on this Court's statement that, for an officer's observation to be a "search" within the meaning of the Fourth Amendment, it must infringe on an expectation of privacy that society respects "as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 40 (1988); Pet. Br. 26. Once Callahan invited the informant to enter his home and revealed its contents to the informant, petitioners claim, Callahan ceased to have a legitimate expectation of privacy that might be offended when armed officers later barged inside. Pet. Br. 17, 25-28; see also U.S. Br. 14-16.

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[2] The question presented in the petition for a writ of certiorari specifically invited this Court to address the so-called "'consent once removed' exception to the Fourth Amendment warrant requirement." Pet. i. While petitioners drop any reference to that concept in the reformulated question in their brief, Pet. Br. i, this Court granted review of the questions presented in the petition.

Those theories make no sense. An expectation of privacy is "reasonable" or "legitimate" where it "has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143-144 (1978)). For centuries, "concepts of real or personal property law" and the "understandings that are recognized and permitted by society" have made it clear that consent to the entry of a single individual does not authorize the entry of anyone (or everyone) else who wishes to come inside. The law and social custom alike studiously respect and enforce the expectation that, when a citizen invites another into his home, that invitation extends only to the person invited.

1. *More Than A Century Of Legal Tradition Confirms That Consent To One Person's Entry Does Not License Others To Enter*

The law has long been clear: Inviting a guest into one's home does not license the uninvited to enter as well. For over a century, American legal treatises have recognized that "a mere licence * * * is personal to the grantor, and cannot be assigned * * * ." 1 H. Roscoe, *A Treatise on the Law of Actions Relating to Real Property* 687 (1825). A license to enter property could not "be assigned without the consent of the licenser." C. Tiedeman, *An Elementary Treatise on the American Law of Real Property* 497 (1884). Since an invitee's or licensee's right to be present in the home cannot be transferred to allow another to enter, surely it cannot be *expanded* to permit (or taken as automatically permitting) *myriad others* to enter. "Permission to dump 'a few stones' upon property is not a permission to cover it with boulders." W. Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 18, at 118 (5th ed. 1984). Likewise, granting an invitee permis-

sion to come inside does not permit him to bring the United States cavalry with him—much less for the cavalry to enter on its own.

That principle—that a license to enter the home cannot be transferred or expanded—has deep roots. In the 19th century, even members of the household could not extend their license to exercise dominion over the property absent express permission from the head of the household. One treatise of that era thus declared that a "wife, when she is not the general agent of her husband, nor specifically authorized to act in the particular instance, cannot grant a valid license to a stranger to enter on her husband's land, and remove property therefrom * * * ." 2 T. Waterman, *A Treatise on the Law of Trespass* 184 (1875). Blackstone's *Commentaries* similarly reflected the fact that, even where the homeowner licensed certain individuals to enter, they could not extend that license to others. For that reason, the common law at that time deemed a thief guilty of burglary—for "breaking and entering"—even if he was freely admitted into the home by someone with license to be there, such as a servant. See 4 William Blackstone, *Commentaries* *226-*227; see also 3 J. Chitty, *A Practical Treatise on the Criminal Law* 1093 (1816).

The notion that an invitation to enter the home does not extend beyond the invitee himself pervades the law today. See, *e.g.*, *Restatement (Second) of Torts* § 892A cmt. e (1979) ("[O]ne who consents that another may walk across his land does not, without more, consent that * * * a third person may walk across it along with the other."). Thus, this Court has held that, while hotel guests implicitly consent to hotel staff members entering their rooms, that consent does not permit those staff members to allow entry by government agents. *Stoner* v. *California*, 376 U.S. 483, 489-490 (1964). Likewise, while a landlord may have a clear right to enter a tenant's home,

the landlord may not extend his right by admitting law enforcement. *Chapman* v. *United States*, 365 U.S. 610, 617 (1961). And this Court has made clear that overnight guests who "have no legal interest in the premises" do "not have the legal authority to determine who may or may not enter the household." *Minnesota* v. *Olson*, 495 U.S. 91, 99 (1990). *A fortiori* the presence of a temporary visitor for a few minutes cannot "determine who may or may not enter the household."

The law thus has long respected and protected the homeowner's expectation that his abode will be free from intrusion by anyone except those he has specifically invited to enter. Those invited inside may be invitees or licensees. But anyone else is a trespasser—or potentially worse—despite the presence of invitees inside. 2 Waterman, *supra*, at 183 ("To constitute a license which amounts to a defense to an action of trespass, where authority to enter is not given by law, there must have been a permission to enter upon the premises.").

That legal tradition reflects the longstanding custom that the home remains a private and inviolate refuge from the outside world—protected against entry by the uninvited—even when we exercise the longstanding and socially valuable tradition of welcoming selected guests or visitors inside. Because the home is private, permission to enter is "so much a matter of personal trust and confidence that it does not extend to any one but the licensee, and is not capable of being assigned or transferred by the person to whom it is granted." C. Boone, *A Manual of the Law of Real Property* 149 (1883). For similar reasons, even legally *sanctioned* entries pursuant to a warrant cannot be extended to include additional

individuals who are not involved in the warrant's execution.[3]

The notion underlying consent-once-removed—that admitting a single individual into the home somehow makes it permissible for others to enter or otherwise eliminates privacy expectations against entry of the uninvited—is thus utterly at war with centuries of legal tradition. An invitation to enter addressed to one person has long been strictly limited to that person; it neither extends nor can be transferred to others. Admitting a guest into the home thus has never been thought to "waive" the homeowners' expectation that others will not invade his home uninvited. Likewise, the law has protected our shared social expectation that, even when we invite a guest into our home, the home remains otherwise private and protected from invasion by those whom we have not invited inside. Given those clear social and legal traditions, the uninvited entry here cannot be deemed "reasonable."

2. *Shared Social Norms And Commonsense Confirm That A Homeowner's Consent To One Person's Entry Does Not Destroy His Legitimate Privacy Expectations*

In determining the lawfulness of police entry, this Court also considers our shared social expectations. "The constant element in assessing Fourth Amendment reasonableness in the consent cases," the Court has explained, "is the great significance given to widely shared social expectations * * * ." *Randolph*, 547 U.S. at 111. Here, those social expectations are clear: Inviting another into your home—whether a friend or informant—

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[3] As this Court observed: "[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant * * * ." *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999).

does not eliminate your expectation that your home will remain private and secure against uninvited and unwelcome entry by others.

To the extent that commonsense observation requires documentation, it is easily found. Addressing a variety of contexts, the leading guides to social comportment explain that, "[i]n social life, only those who are invited are invited * * * ." J. Martin, *Miss Manners: A Citizen's Guide to Civility*, 324 (1996); see also P. Post, *Everyday Etiquette* 111 (1999) ("[An] invitation is intended only for the person to whom it is addressed."); J. Martin, *Miss Manners' Guide to Excruciatingly Correct Behavior* 403-404, 566 (2005). That limitation on the scope of invitation ordinarily excludes even uninvited significant others and children. See Post, *Everyday Etiquette*, *supra*, at 111. While hosts often attempt to accommodate the wishes of their guests, it remains their absolute prerogative to decline to entertain the uninvited. See P. Post, *Emily Post's Entertaining* 14 (1998). As this Court has observed, hosts "have the authority to exclude despite the wishes of the guest." *Olson*, 495 U.S. at 99.

That is not a fancy principle of etiquette but a bedrock social rule. When a homeowner invites a guest into his home, he does not expect others (whether the guest's associates or total strangers) to barge in at will. He understands that only the guest will enter. Likewise, the guest naturally understands that an invitation to enter the home extends to him and him alone—and not to undisclosed associates who may arrive later. A contrary rule would destroy the valuable and longstanding tradition of entertaining guests in the home. Few would invite others into their homes if the necessary consequence were that strangers could enter uninvited. Here, Callahan may have invited the informant into his home. But our shared social traditions make clear that, in so doing, Callahan did not create an open-ended license for, or

surrender his privacy interests in the home with respect to, entry by others.

B. The Entry Of Police Officers Into The Home Materially Interferes With Protected Fourth Amendment Interests

Focusing on an unduly narrow notion of privacy, the United States defends consent-once-removed by urging that, once the informant is inside the home, "the entry of additional officers * * * works no constitutionally significant incremental interference with the resident's privacy interests." U.S. Br. 13; see also Pet. Br. 20-28.[4] The United States thus contends that, once the informant viewed the contents of Callahan's home, the entry of additional law enforcement officers "revealed no private information that could not equally have been revealed through Bartholomew's recounting of his observations." U.S. Br. 16.

That argument proceeds from the erroneous premise that the Fourth Amendment's privacy protections are limited to the right to keep the contents of one's home "secret" or free from view. For centuries, however, the common law and the Fourth Amendment have protected the far broader interest of personal security and freedom from unwanted physical intrusion into the home. But even if one were to erroneously define "privacy" so narrowly as to embrace only freedom from unwanted observation, longstanding social custom and our shared values—to say nothing of commonsense—all make clear

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[4] To the extent the United States assumes that the additional officers entered to assist the informant in "perform[ing] the arrest effectively," U.S. Br. 13, its analysis rests on a false premise. There is no evidence that the informant in this case ever sought to conduct an arrest. J.A. 126; see also pp. 25 n.7, 28, *infra*. To the contrary, when the police entered, they seized the informant—ordering him to the ground with the others. J.A. 126.

that there is an enormous difference between the intrusion that is occasioned when a single, invited guest tells others of the home's contents and the intrusion that occurs when numerous others barge in uninvited to see for themselves.

1. *The Fourth Amendment Protects Freedom From Uninvited Physical Intrusion Into The Home*

The United States' position rests in the first instance on a false premise—that the Fourth Amendment protects only an individual's "expectation of privacy" in the sense of freedom from observation. The Fourth Amendment protects more than that. It also protects "privacy" in the sense of security, seclusion, and freedom from physical invasion in the home. This Court's decision in *Payton* could not be more clear: Warrantless "*physical entry* of the home" was "the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585 (emphasis added) (internal quotation marks and citation omitted). Similarly, in *Silverman* v. *United States*, 365 U.S. 505 (1961), the Court held that the police violated the Fourth Amendment when they inserted a listening device into the home, holding that the "actual intrusion into a constitutionally protected area" itself violated the Fourth Amendment. *Id.* at 512. As this Court later explained, "[i]n *Silverman*, * * * we made clear that *any physical invasion* of the structure of the home, 'by *even a fraction of an inch*,' was too much." *Kyllo* v. *United States*, 533 U.S. 27, 39 (2001) (emphasis added). A citizen who chooses to live in a glass house, for example, might expose its contents to public view. But that surely does not mean government agents could enter that structure at will. The sanctity of the home against physical intrusion has never been a function of its opacity.

In fact, this Court's early Fourth Amendment cases, like early English cases, focused *exclusively* on physical intrusion—not visual observation. See *Kyllo*, 533 U.S. at 31-32. That is consistent with the Fourth Amendment's roots in the protection of private property. D. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. Crim. L. & Criminology 249, 284 (1993). One of the core attributes of private property includes the owner's "right to exclude" (and conversely to admit) others as he chooses. *Rakas*, 439 U.S. at 143 n.12. Homeowners therefore have long had the near-absolute right to determine both who and how many may enter the home. Consent to enter is personal, specific, and non-transferable precisely because that effectuates the homeowner's fundamental right to decide who can—and who cannot—enter the home.

The Framers understood that tradition, adopting the Fourth Amendment against the backdrop of the famous observation in *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194 (K.B. 1604), that the "house of every one is as his castle and fortress," as well as the statement attributed to William Pitt (Earl of Chatham):

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Miller v. *United States*, 357 U.S. 301, 307 (1958). While this Court has since appropriately expanded the Fourth Amendment's reach to encompass intrusions beyond physical invasions, see *Kyllo*, 533 U.S. at 32, the Court has never abandoned protecting the home against physical entry, much less downgraded the home's threshold to a permeable membrane incapable of resisting uninvited,

warrantless entry whenever the owner has allowed a guest (even an informant) inside.

This Court's cases referring to the Fourth Amendment's protection of "privacy" thus do not limit that protection to unwarranted *viewing* of the inside of the home. The word "privacy" encompasses not merely freedom from unwarranted observation, but also "[t]he state of being free from *unsanctioned intrusion*." *The American Heritage Dictionary of the English Language* 1396 (4th ed. 2000) (emphasis added). "Privacy" means the "[s]tate of being apart from *the company or observation* of others." *Webster's New Int'l Dictionary* 1969 (2d ed. 1954) (emphasis added). Because the Fourth Amendment protects the citizen's right to keep his home free of uninvited physical invasion, "the entry of additional officers" into the home, U.S. Br. 13, most assuredly works a "constitutionally significant incremental interference with the resident's privacy interests," *ibid.* Virtually everyone understands that there is an extraordinary difference between entertaining a single guest (even an informant) in the home, and having multiple armed officers barge into the premises uninvited. The law and social tradition alike have long recognized that distinction. There is no basis for departing from it here.

2. *Observation Of The Inside Of The Home By Additional Officers Materially Invades Other Privacy Rights*

Even if "privacy" is viewed narrowly as freedom from unwanted observation, the United States' position still fails. There is an enormous difference between having one's home viewed by a single visitor, who may describe what he saw to others (including the police), and having the home's interior viewed directly by others (including the police) who enter uninvited. We all invite others into our homes despite the risk that those inside may describe

its contents to others. But that hardly means that, in so doing, we license the world to enter and look for itself. To the contrary, the very reason invitations and licenses to enter are not transferable or expandable is that having different or additional people view the contents of your home is quite different from having an invitee later describe things to others. See pp. 11-16, *supra*.

Thus, "[o]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police." *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion). But the risk of "reporting to the police" translates to the possibility of probable cause and issuance of a warrant. It does not translate into free license for the uninvited to make a warrantless entry. For the same reason, petitioners' reliance on *Lewis* v. *United States*, 385 U.S. 206 (1966), see Pet. Br. 22-26, is fundamentally misplaced. In that case, Lewis voluntarily admitted an undercover officer into his home and sold him drugs. 385 U.S. at 207. Several months later, after the police arrested and charged Lewis, Lewis sought to exclude evidence obtained by the undercover officer when he was inside Lewis's home with Lewis's consent. *Id.* at 208. This Court held that, by selling drugs from his home, Lewis ran the risk that the buyer would be reporting to the police or that the buyer was himself an undercover agent. But nothing in *Lewis* suggests that, by running that risk, the homeowner also licensed *other*, uninvited government agents to enter without a warrant.

For similar reasons, the United States' reliance on *Illinois* v. *Andreas*, 463 U.S. 765 (1983), and *United States* v. *Jacobsen*, 466 U.S. 109 (1984), is misplaced. U.S. Br. 14-16. Both *Andreas* and *Jacobsen* involved warrantless reexaminations of *packages* that the owner had entrusted to another and that had previously been opened and searched by private parties *outside the home*. Neither of those cases involved an uninvited physical in-

vasion of the home. It might be that, when we send our possessions outside the home, we ordinarily expect that they may be inspected by others without our consent. For example, in *Andreas*, this Court stated that "[c]ommon carriers have a common law right to inspect * * * based on their duty to refrain from carrying contraband." 463 U.S. at 769 n.1. But our legal and social expectations for the home are wholly different. In the home, the fact that one person has been invited inside has never been thought to allow others to enter. Nor is there any legal or social basis for suggesting that law enforcement can enter the home uninvited and without a warrant if they are merely "reenacting," U.S. Br. 14-16; Pet. Br. 26-28, an invited guest's prior entry.

3. *Petitioners' Defense Of Consent-Once-Removed Proves Too Much*

Consent-once-removed also does not make sense in its own right. That purported exception to the warrant requirement applies "only where *the agent (or informant) entered at the express invitation* of someone with authority to consent, at that point established the existence of *probable cause* * * *, and *immediately summoned help* from other officers." *United States* v. *Diaz*, 814 F.2d 454, 459 (7th Cir. 1987) (emphasis added). But, if the arguments advanced by petitioners and the United States in support of the theory are valid, most of those putative preconditions would be irrelevant.

For example, petitioners and the United States defend petitioners' warrantless entry by declaring that Callahan's decision to expose the contents of his home to Bartholomew, who turned out to be an informant, somehow "waived" his Fourth Amendment rights, see p. 10, *supra*, or so diminished his privacy expectations that the later entry by multiple officers "work[ed] no constitutionally significant incremental interference with [those]

privacy interests," U.S. Br. 13. If those arguments were correct, there would be no reason to require "probable cause" as a precondition to police entry. If Fourth Amendment rights have been waived, or there is no "search" within the meaning of the Fourth Amendment, probable cause is not required. See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973) (probable cause unnecessary for "a search that is conducted pursuant to consent"); *Florida* v. *Riley*, 488 U.S. 445, 452 (1989) (no probable cause needed for aerial surveillance because it is not a "search"); *id.* at 456 (Brennan, J., dissenting). Nor would there be any need for the informant to "immediately summon[] help" from other officers. Absent a valid expectation of privacy, the officers would be free to enter whether summoned or not. The consent-once-removed doctrine therefore must be seen for what it is—an unjustified assault on the warrant requirement itself.

C. The Balance Of Private And Law Enforcement Interests Tilts Decidedly Against Consent-Once-Removed

Sometimes, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). Here, that balance weighs strongly in favor of preserving the warrant requirement.

The individual's Fourth Amendment interests are of the highest order here. The "sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). The warrant requirement serves a critical role in preserving that sanctity. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial

officer, not by a policeman or Government enforcement agent." *United States* v. *Jackson*, 333 U.S. 10, 14 (1948).

By contrast, consent-once-removed serves no legitimate law enforcement interest not already served by existing law. Law enforcement officers who wish to enter the home immediately after a controlled buy, like the one at issue here, often will have ample opportunity and sufficient cause to obtain an ordinary warrant. Here, for example, the officers learned in the middle of the morning that Callahan would be selling drugs from his home later that night. J.A. 114. Hours before the controlled buy, the informant visited Callahan's home, confirmed that Callahan had methamphetamine for sale, "tasted" the drugs, and advised the officers that the drugs were there and available for purchase. J.A. 115-118, 145. While the officers spent the next two hours preparing a controlled buy inside the home—wiring the informant with listening equipment, casing the home to identify the best points of entry, and arranging for the informant to signal them when the buy was complete—they never attempted to get a warrant. J.A. 54-56, 89, 245. Given the amount of time the officers had—and the information available to them—they had no legitimate excuse for failing to do so.[5]

Even if probable cause were lacking before the buy occurred, the officers had multiple options available. They could have sought an "anticipatory warrant" to validate entry once the controlled buy occurred. When

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[5] Probable cause exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). Here, the officers thought they had probable cause, or were at least close to it, even before they learned that the informant had sampled Callahan's wares to verify that it was indeed methamphetamine. J.A. 257 ("I thought we were slim. We probably could have wrote a warrant, maybe, and maybe not.").

police officers do not yet have probable cause, but believe that a specific, future event will give them probable cause, they may seek an "anticipatory" warrant that becomes effective if and when that anticipated event occurs. See generally 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 400 (4th ed. 2004). Here, the officers at least had probable cause to believe that a controlled buy would take place. Their suspicions were sufficient to justify the efforts of multiple officers for several hours to effect the operation. Nothing prevented them from seeking an anticipatory warrant that identified the controlled buy as the "triggering" event. See *State* v. *Womack*, 967 P.2d 536, 539-540 (Utah Ct. App. 1998); *United States* v. *Hugoboom*, 112 F.3d 1081, 1085-1086 (10th Cir. 1997); see also *United States* v. *Grubbs*, 547 U.S. 90, 95-97 (2006).

Alternatively, the officers could have continued their surveillance of Callahan's home after the controlled buy, sought an expeditious "telephonic warrant," and entered once they received the warrant.[6] And if Callahan had attempted to leave the home before the officers obtained that warrant, they could have detained Callahan outside the home and secured the premises until the warrant was issued. *Illinois* v. *McArthur*, 531 U.S. 326, 331-332 (2001). There is no reason petitioners could not have obtained a telephonic warrant either after the buy occurred, or at some point during the two hours they were at the Sheriff's office preparing the operation.

Invoking officer safety, the United States observes that "the government has a substantial interest in ensuring that sufficient law-enforcement personnel are

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[6] See Utah R. Crim. P. 40(l) (originally enacted as Utah Code Ann. § 77-23-204(2) (2002)) (authorizing telephonic warrants). The Federal Rules of Criminal Procedure likewise permit the issuance of telephonic warrants. See Fed. R. Crim. P. 41(d)(3).

present to perform [an] arrest effectively and without undue risk of violent resistance." U.S. Br. 13. But nothing in the warrant requirement precludes that need from being met. Where the police decide ahead of time to arrest the suspect in the home—as was the case here[7]—the police can obtain a warrant or anticipatory warrant to validate the entry of sufficient officers to effect the arrest safely.

To the extent the officers do not plan to enter but unanticipated circumstances make an immediate, in-the-home arrest necessary, the "exigent circumstances" doctrine meets any conceivable law enforcement need. Where "the risk of danger to the police" arises unexpectedly, additional officers may enter an individual's home to protect officer or informant safety without a warrant. See *Olson*, 495 U.S. at 100.[8] But petitioners do not argue that exigency justified entry, and with reason: The operation went pretty much as planned. The informant made the controlled buy without Callahan learning that he was an informant. No one detected the surveillance. And no exigency placed the informant at risk or made an immediate in-the-home arrest necessary. The police simply decided to raid a suspect's home without bothering to get a warrant. Under the circumstances,

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[7] As the Utah court of appeals observed, the "Task Force[] adopt[ed] * * * a plan that included * * * entry from the outset." J.A. 338. That was why the officers had surveyed the property to determine the best entry points before the buy took place. J.A. 56; p. 8, *supra*; see J.A. 188 ("[W]e'd be close so that we could enter the residence, that was the decision that the commander had made prior to going there.").

[8] That does not mean that police can plan an operation so as to make exigency a self-fulfilling prophecy. See Pet. App. 10 (noting exigent circumstances "may not be subject to police manipulation or abuse") (internal quotation marks omitted); *United States* v. *Gomez-Moreno*, 479 F.3d 350, 356-357 (5th Cir. 2007).

consent-once-removed does no more than validate precisely what this Court has long condemned—entry into the home without a warrant or exigent circumstances. "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." *Johnson* v. *United States*, 333 U.S. 10, 15 (1948).

Perhaps recognizing as much, petitioners attempt to turn the absence of a warrant from vice into virtue, stating that "warrantless searches will tend to produce significantly less invasive searches" than searches based on "authority of an anticipatory search warrant." Pet. Br. 34. But the warrant is not a mere formality to be avoided when possible. It is a critical protection for the sanctity of the home. Accordingly, "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald* v. *United States*, 335 U.S. 451, 455 (1948).[9] This Court "cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Id.* at 456. "A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Randolph*, 547 U.S. at 116 n.5.

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[9] The warrant requirement also serves law enforcement needs. Where officers obtain a warrant, evidence found during the search will be admissible so long as the officers exercised objective good faith in conducting the search, even if probable cause turned out to be absent. *United States* v. *Leon*, 468 U.S. 897, 922 (1984). Petitioners and their *amici* ignore that benefit to officers in their analysis.

II. Qualified Immunity Is Unavailable Here

The warrantless raid on Callahan's home here was not merely unlawful. It was indefensible. The requirement that officers obtain a warrant before entering the home has been a fixture for decades. Petitioners do not claim that anything unexpected created an exigent need to enter. To the contrary, the officers planned to enter the home from the outset. See pp. 8, 25 n.7, *supra*. Nor could any reasonable officer believe that Callahan, by allowing the informant into his home, impliedly consented to petitioners' entry, waived his Fourth Amendment rights as to their entry, or otherwise gave up his reasonable expectation of privacy and security in his home. Our legal and social traditions have long made it clear that inviting another into your home licenses only the entry of the person so invited; the law has vigorously protected the homeowner's expectation of privacy against entry by those he has not invited inside. See pp. 11-16, *supra*.

In considering facts similar to those here, courts employing a traditional Fourth Amendment analysis have routinely held warrantless home searches unconstitutional absent consent or exigency.[10] Because no objectively reasonable officer confronting the situation before petitioners could have believed that warrantless entry was lawful under the circumstances, qualified immunity was properly denied. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987); *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) ("The relevant dispositive inquiry * * * is whether it

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[10] See, *e.g.*, *United States* v. *Santa*, 236 F.3d 662 (11th Cir. 2000); *United States* v. *Templeman*, 938 F.2d 122 (8th Cir. 1991); *United States* v. *Beltran*, 917 F.2d 641 (1st Cir. 1990); *Carranza* v. *State*, 467 S.E.2d 315 (Ga. 1996); *Hawkins* v. *State*, 626 N.E.2d 436 (Ind. 1993); *Youtz* v. *State*, 494 So.2d 189 (Ala. Crim. App. 1986); *People* v. *Soto*, 96 A.D.2d 741 (N.Y. App. Div. 1983); *State* v. *Yananokwiak*, 309 S.E.2d 560 (N.C. Ct. App. 1983).

would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").

Petitioners nonetheless urge that qualified immunity is available because a few cases have recognized consent-once-removed. Pet. Br. 44-48. But endorsement by a court or two is not itself sufficient to defeat qualified immunity. Courts are not merely capable of error; they are also capable of unreasonable error. *Williams* v. *Taylor*, 529 U.S. 362, 377-378 (2000) (explaining the difference between error and decisions that are "unreasonable"). And this Court has denied qualified immunity in cases like *Hope* v. *Pelzer*, 536 U.S. 730 (2002), notwithstanding the fact that lower courts had permitted the conduct at issue in the past, *id.* at 756-757 (Thomas, J., dissenting) (collecting cases).

In any event, the putative standard for consent-once-removed requires, as one of three preconditions, that the informant in the home "immediately summon[] help" to effectuate an arrest. See, *e.g.*, *Diaz*, 814 F.2d at 459. Here, that never occurred. In fact, the informant was not, and had no intention of, conducting the arrest; the police had planned to do that from the outset. See p. 25 n.7, *supra*. The informant in fact was on his way out the door when the officers stormed the home. J.A. 165 ("As soon as I tried to get out, the door come swinging open. That's when all the deputies ran in."). Because no reasonable officer could have believed the preconditions for consent-once-removed had been met here—even if one incorrectly assumes the doctrine's validity—qualified immunity was inappropriate.

III. The Court Should Release The Lower Courts From *Saucier*'s Rigid "Order Of Battle"

Finally, this Court has requested briefing on whether to overrule *Saucier* v. *Katz*, *supra*. That decision requires lower courts to decide qualified immunity in two

steps—by first deciding whether the allegations established a constitutional violation at all, and then deciding whether the officer violated "clearly established" law. The Court should modify the *Saucier* approach, but not abandon it entirely. In many cases, that two-step approach serves important functions. But it should not be rigidly required where it is unworkable or requires courts to pass on issues that are not necessary to their decisions.

Saucier's mandatory two-step approach is often useful to ensure proper application of qualified immunity principles. The first step in deciding whether or not the law was "clearly established" is to determine the constitutional violation alleged—*i.e.*, to identify the precise conduct, and the attendant circumstances, giving rise to the alleged constitutional violation. Only when that is done can courts go on to decide whether an objectively reasonable officer in those circumstances could have thought his conduct lawful. Requiring courts to decide whether there was a constitutional violation at all under the specific facts thus is a useful way of ensuring that qualified immunity is properly applied in an appropriately fact- and context-specific way. *Saucier*, 533 U.S. at 201-202; *Anderson*, 483 U.S. at 640-641. The two-step analysis, moreover, often makes a court's reasoning clearer. It thus helps courts fulfill their duty to "say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). Given this Court's unique role of providing uniform, nationwide guidance for all courts to follow, this Court's use of the two-step approach is often particularly useful.

Correspondingly, however, this Court often departs from the two-step process where it would interfere with that function. See, *e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam) (bypassing the constitutional question "to correct a clear misapprehension of the

qualified immunity standard"); *Saucier*, 533 U.S. at 207 (similar). Rigid adherence in the lower federal courts is also inappropriate, albeit for different reasons. Litigating constitutional issues can be burdensome. Qualified immunity, however, is "an *immunity from suit*, rather than a mere defense to liability." *Saucier*, 533 U.S. at 200-201 (internal quotation marks and citations omitted). As a result, the two-step approach will sometimes disserve the purpose of qualified immunity if it forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily. Likewise, requiring resolution of those issues may contravene longstanding principles of judicial restraint. Courts ordinarily should not decide "questions of constitutionality * * * unless such adjudication is unavoidable," *Scott* v. *Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)); nor should they generate analysis that appears unnecessary to the case's resolution.[11]

Sometimes the two-step approach is deemed necessary for the elaboration of principles of criminal procedure. *Saucier*, 533 U.S. at 201. Given this Court's unique role of ensuring that federal and constitutional law is uniform throughout the land—and that no one receives a different brand of federal justice based on the happenstance of geography—this Court will often be justified in resolving divisions of authority on constitutional questions before addressing whether the law was clearly established. But lower federal courts need not be dragooned into doing likewise in every case. Before

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[11] See *Ex parte Randolph*, 20 F.Cas. 242, 254 (Marshall, Circuit Justice, C.C.D. Va. 1833); *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Saucier, federal courts regularly decided constitutional issues just as they do today—through motions to suppress, suits against municipalities, and requests for injunctive relief, to name a few. There is thus little reason to enforce a rigid rule requiring them to do so in § 1983 suits as well.

In this case, this Court should exercise its own discretion to apply *Saucier*'s two-step approach. The validity of consent-once-removed as a justification for warrantless entry is important and squarely before the Court. Analyzing the validity of that doctrine in the first instance, moreover, casts significant light on the qualified immunity analysis. Admitting a single guest into the home has never been thought to somehow waive or defeat a homeowner's expectation that his home will be free from physical intrusion by the uninvited. The contrary notion is so clearly contradicted by centuries of legal tradition and social norms that no objectively reasonable officer would have entertained it.

CONCLUSION

For the foregoing reasons and those stated in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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CORDELL PEARSON, ET AL.,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus curiae the National Campaign to Restore Civil Rights will address the following question, which the Court instructed the parties to brief and argue:

Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Campaign to Restore Civil Rights is a collection of more than one hundred civil rights organizations and numerous individuals who came together to ensure that the courts protect and preserve justice, fairness, and opportunity. *Amicus* believes that the judiciary is the branch of government that the founders of this nation intended to safeguard individual rights and liberties. The founders recognized that an independent and vigorous judiciary is a necessary predicate for a true democracy. The judiciary is often the last resort for people in the United States whose rights have been violated by the actions of government officials.

Amicus is concerned about judicial doctrines, such as qualified immunity, that can leave some victims of unconstitutional conduct without a remedy. If this Court were to overrule *Saucier v. Katz*, 533 U.S. 194 (2001), it would become even more difficult for victims to obtain relief despite having suffered a violation of their constitutional rights.

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should not overrule *Saucier v. Katz*, 533 U.S. 194 (2001). As it stands, the qualified immunity doctrine already imposes significant costs on a victim of unconstitutional government conduct because it prevents that person from obtaining relief against the wrongdoer. There is a substantial debate about whether that cost to such victims is justified by the supposed benefits to the government and its agents of being immune from actions for compensatory relief when their conduct exceeds constitutional limits. This case does not, however, require the Court to revisit the underlying question whether the balance struck by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is still appropriate. But this case should not result in a shift in that balance to weigh more heavily in favor of government officials to the detriment of even more victims of unconstitutional conduct. And that would be the result of overruling *Saucier*.

A. *Saucier*'s two-step approach to qualified immunity means that, where a person brings a suit against government officials alleging that those officials violated his constitutional rights, the court will determine, as a threshold matter, whether the allegations state a constitutional violation. If the court determines that the allegations do not violate the Constitution, that case is dismissed. If the court determines that the allegations do state a constitutional violation, the court still will dismiss the suit at the second step of the analysis if it

determines that the right violated was not clearly established.

Because the court makes an initial determination that there was a constitutional violation, that ruling contributes to the development of constitutional law so that, in the future, it will be clearly established that the official conduct in question is unconstitutional. That means that if another person's constitutional rights are violated by the same type of government conduct, that victim can seek relief against the officials and not be barred by qualified immunity because the unlawfulness of the conduct will be clearly established.

There are numerous examples in the case law of a constitutional ruling at the first step of *Saucier* ensuring that a future victim of the same type of unconstitutional government conduct was able to proceed with his suit specifically because the earlier constitutional ruling meant that the unconstitutionality of the conduct was clearly established.

These case examples serve as concrete evidence of what is at stake in this case. If the Court were to overrule *Saucier*, courts confronted with allegations of unconstitutional conduct against government officials would regularly dismiss such cases based on determinations that, even if there were a constitutional violation, the law was not clearly established. That means that when the next victim of the same type of official conduct brings suit, that case also would be dismissed in the same manner

because there would be no prior adjudication of the allegations to clearly establish that the conduct was unconstitutional. That approach would multiply the number of victims denied a remedy against government officials who violated their constitutional rights.

B. The current approach to qualified immunity under *Saucier* deters future constitutional violations because a threshold determination that there was a constitutional violation often prompts revision to government policies directing officials to conform their conduct to constitutional standards.

Again, there are examples of case law that has led to just such changes in official policy due to a determination at the first step of *Saucier* that certain official conduct is unconstitutional. These examples are more concrete evidence of the benefits of *Saucier* that would be lost if it were overruled.

Moreover, the determination by the courts at the first step of *Saucier* benefits government officials when the determination is to the contrary, *i.e.* where the court finds the allegations do not state a constitutional violation. In such instances, government officials are confident that they may continue to engage in conduct that they have determined best furthers the government's interests, without fear of future constitutional litigation. The *Saucier* approach also redounds to the benefit of the judiciary by reducing the number of subsequent actions challenging the same or similar conduct as

unconstitutional after that conduct has been deemed lawful by a court.

C. The Court should decline expansion of the qualified immunity doctrine particularly because of the weak empirical basis for the assumptions underlying the doctrine.

Moreover, neither petitioners nor their *amici* have identified an alternative approach to qualified immunity that would better serve the Court's goals of ensuring the development of the law and providing certainty for individuals and government officials. Elimination of *Saucier* from Fourth Amendment cases is not warranted and would increase the already high costs associated with granting government officials qualified immunity.

The suggestion that *Saucier* be applied as a discretionary matter ignores the failures of such an approach in the past. The mandatory nature of *Saucier* ensures that, although there will be no remedies against officials who violate the constitutional rights of individuals where the law is unclear, the law will not remain unclear forever. This Court should reaffirm its holding in *Saucier* in order to prevent a broader application of qualified immunity, and to maintain the balance struck by this doctrine.

ARGUMENT

SAUCIER V. KATZ SHOULD NOT BE OVERRULED BECAUSE ITS TWO-STEP APPROACH REDUCES THE COSTS TO INDIVIDUALS AND SOCIETY OF THE QUALIFIED IMMUNITY DOCTRINE

A. *Saucier*'s Two-Step Approach Means That, Where The Same Or Substantially Similar Unconstitutional Conduct Persists, Suits By Future Victims Will Not Be Barred By Qualified Immunity

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court set forth a two-step analysis for courts to follow in cases alleging unconstitutional conduct by government officials. Under *Saucier*, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged." *Id.* at 200. If a constitutional violation has been alleged, then "the next, sequential step is to ask whether the right was clearly established * * * in light of the specific context of the case, not as a broad general proposition." *Id.* at 201. If the law was not "clearly established" at the time of the alleged unconstitutional conduct, the court is instructed to grant qualified immunity to the defendant officials and to deny the plaintiff recovery from the officials for the injuries inflicted by their unconstitutional conduct. *Ibid.*

1. *Saucier* protects individuals whose constitutional rights have been violated because it causes development of the law governing the constitutionality of government conduct. That means

that if the same type of unconstitutional conduct by a government official occurs again, the law will be clearly established and the suit will not be barred by qualified immunity. *See Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007) (consideration of the merits "is 'necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.'" (quoting *Saucier*, 533 U.S. at 201)). Consequently, although the first victim to bring a suit against such unconstitutional conduct is barred from a remedy against the wrongdoer, subsequent victims of the same type of conduct will not be barred.

2. There are numerous concrete examples of such instances where a constitutional ruling at the first step of *Saucier* has demonstrably benefited subsequent victims of similar unconstitutional conduct. Below we describe some of the numerous cases in which victims of unconstitutional official conduct were able to overcome claims of qualified immunity through reliance on earlier judicial determinations made at the first step of *Saucier* to demonstrate that the law on the unconstitutionality of the conduct was clearly established. These cases are good examples of constitutional violations that may well have gone unremedied if the two-step approach in *Saucier* were abandoned.

a. In *Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003), the plaintiff brought a Section 1983 action against social workers who allegedly entered the plaintiff's home and seized her child without a warrant or exigent circumstances in violation of the

plaintiff's Fourth Amendment rights. Under the first step of *Saucier*, the Tenth Circuit clarified rulings from several older cases and declared "henceforth, the law is clearly established that, absent probable cause and a warrant or exigent circumstances, social workers may not enter an individual's home for the purpose of taking a child into protective custody." *Id.* at 1250 n.23. Under the second step of *Saucier*, however, the Court held that, based on the facts of the case and the doctrinal ambiguity at the time of the challenged actions, the state social workers were entitled to qualified immunity. *Id.* at 1250 & n.23. Thus, that plaintiff was denied the right to seek a remedy based on allegations that stated a constitutional violation, but the court's ruling on the unconstitutionality of the conduct would allow plaintiffs in later cases were able to vindicate their rights.

In a subsequent case, *Turner v. Houseman*, 268 Fed. Appx. 785, 788 (10th Cir. 2008), the Tenth Circuit rejected a social worker's claim of qualified immunity for entering the plaintiff's house to remove his child without a warrant or exigent circumstances. The court held that *Roska* removed any doubt that such conduct constituted a violation of the Fourth Amendment.

b. In *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005), high school students brought a Section 1983 action against teachers who allegedly conducted strip searches in the school locker rooms and the police officer who instructed the

teachers to search the female students. Applying the *Saucier* two-step approach, the Sixth Circuit first held that the nonconsensual strip searches on a substantial number of high school students without individualized suspicion to find missing money were unreasonable and violated the Fourth Amendment. *Id.* at 605. Under the second step of *Saucier* the Sixth Circuit granted qualified immunity to the teachers and police officer, however, because the searches did not violate clearly established law. *Id.* at 608.

In a subsequent case, *Brannum v. Overton County School Board*, 516 F.3d 489 (6th Cir. 2008), middle school students brought a Section 1983 action against school officials who installed video cameras in the school locker rooms and thus could view the students nude. The Sixth Circuit rejected the school officials' claims of qualified immunity, holding that the video cameras installed in school locker rooms were similar enough to the searches that *Beard* had clearly established as violating the Fourth Amendment that their unconstitutionality was clearly established. *Id.* at 494.

c. In *Gregorich v. Lund*, 54 F.3d 410 (7th Cir. 1995), a former employee brought a Section 1983 action against his former supervisor, alleging that the employee had been terminated for engaging in union organizing activities. Applying the two-step approach that would later be mandated by *Saucier*, the Seventh Circuit first held that union organizing is a matter of public concern that is protected under the First Amendment. Under the second step, however,

the Seventh Circuit granted the supervisor qualified immunity because it was not clearly established that he could not terminate an employee for attempting to unionize. *Id.* at 418.

In a subsequent case, *Stagman v. Ryan*, No. 96-C-8012, 1997 WL 223074, at *6 (N.D. Ill. 1997), *aff'd*, 176 F.3d 986 (7th Cir.), *cert. denied*, 528 U.S. 986 (1999), a former employee brought a Section 1983 action against officials in the Illinois Attorney General's Office who allegedly terminated the employee in retaliation for the employee encouraging fellow union members to reject a proposed plan. The United States District Court for the Northern District of Illinois rejected the officials' claims of qualified immunity. The court held that *Gregorich* clearly established that union organizing is a matter of public concern protected under the First Amendment. *Ibid.*

d. In *Kuha v. City of Minnetonka,* 328 F.3d 427, *aff'd on reh'g*, 365 F.3d 590 (2003), the Eighth Circuit held at the first step of its *Saucier* analysis that an officer's failure to warn a criminal suspect that the officer is about to release a bite-and-hold trained animal violated the Fourth Amendment, but held that the right was not clearly established.

In a subsequent case, *Kruse v. Jackson*, No. 05-CV-2123, 2006 WL 3758204 (D. Minn. Dec. 20, 2006), the United States District Court for the District of Minnesota denied qualified immunity to a police officer sued for an injury based on the same

conduct. The district court based its determination that the law was clearly established on the Eighth Circuit's initial holding in *Kuha*. *Id.* at *5.

e. In *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002) (en banc), a plaintiff brought a Section 1983 action against police officers seeking damages for allegedly using excessive force when the officers, from point blank range, aimed their guns at the plaintiff's head even though the plaintiff was plainly unarmed. The Court found that the plaintiff had alleged a violation of his Fourth Amendment rights, but that in 1995 (when the misconduct occurred) the Circuits were still struggling to apply the new objective reasonableness standard from *Graham v. Connor*, 490 U.S. 386 (1989), to excessive force claims involving the use of guns by police officers. Therefore the law was not clearly established at the time and the officer defendants were entitled to qualified immunity. *Robinson*, 278 F.3d at 1015-1016.

In a subsequent case, *Hepner v. Balaam*, No. 3:03-CV-0681, 2007 WL 2033367, at *6 (D. Nev. July 10, 2007), the United States District Court for the District of Nevada refused to grant qualified immunity to a sheriff who drew his weapon during a traffic stop. The court reasoned that "the Ninth Circuit's opinion in *Robinson* * * * clearly established in 2003 that pointing weapons at unarmed suspects after determining that they were not armed would violate[ ] the suspects' constitutional rights."

Similarly, in *Hopkins v. Bonvicino*, No. C-05-02932, 2006 WL 3785640 (N.D. Cal. Dec. 21, 2006), the United States District Court for the Northern District of California rejected police officers' claims of qualified immunity for allegedly pointing their guns at an individual suspected of driving while drunk who was complying with the police officers' instructions. The district court determined that given the holding in *Robinson*, the law was clearly established at the time of the suspect's arrest. *Id.* at *5.

f. In *Cruz v. Kauai County*, 279 F.3d 1064, 1066 (9th Cir.), *cert. denied*, 537 U.S. 1053 (2002), the plaintiff brought a Section 1983 action against a prosecutor seeking damages for the prosecutor's alleged violation of plaintiff's Fourth Amendment rights when the prosecutor recklessly, without further factual investigation, swore to the truth of facts contained in an affidavit submitted in support of a motion to revoke plaintiff's bail. The facts were obtained from plaintiff's ex-wife who was involved in a bitter child custody dispute with the plaintiff. *Ibid.* Under the first step of *Saucier*, the Ninth Circuit held that there was a Fourth Amendment right "not to have a prosecutor, in order to obtain a bail revocation, personally attest to a false statement of a biased source with no investigation of the statement's truth or falsity." *Id.* at 1069. But then, under the second step of *Saucier*, the Ninth Circuit granted the prosecutor's claim of qualified immunity, holding that this right was not clearly established at the time of the prosecutor's conduct. *Ibid.*

In a subsequent case, *Brown v. Nisley*, No. CV-03-1713, 2004 WL 1202815 (D. Or. May 10, 2004), *adopted by* 2004 WL 1687868 (D. Or. July 26, 2004), the plaintiff brought a Section 1983 action against a prosecutor seeking damages for violating her Fourth Amendment rights when the prosecutor appended a corrections facility's letter to his own affidavit submitted in support of a motion for a no-bail arrest warrant for plaintiff without having investigated the truth of the corrections facility's assertions that plaintiff had failed to serve her sentence. The United States District Court for the District of Oregon rejected the prosecutor's claim of qualified immunity, holding that "[a]lthough the prosecutor in *Cruz* was able to obtain qualified immunity because the right to be free from such prosecutorial conduct was not clearly established at the time, *Cruz* clearly established this right in all subsequent cases." *Id.* at *13.

These examples demonstrate the reality of men, women, and children who were allowed to seek a remedy for a government official's violation of their constitutional rights because *Saucier* compelled earlier courts to clearly establish constitutional rights before addressing qualified immunity.

B. *Saucier* Allows Governments To Adopt Policies That Direct Their Officials To Conform Their Conduct To Established Constitutional Standards And Thus Discourages Unconstitutional Conduct

1. The *Saucier* approach also benefits the public more broadly because it puts government entities on notice of what constitutes unconstitutional conduct and what does not. When a court rules that the allegations in a case establish a constitutional violation, that ruling allows local governments to incorporate the standard into their policies and procedures. Those standards can then prevent future recurrence of the same unconstitutional conduct. And that is true regardless of how the second step regarding the applicability of qualified immunity is resolved in the case.

At the same time, a court ruling that certain conduct is not unconstitutional also benefits the public. It permits government entities to engage in conduct that they determine will benefit the public, without fear of future constitutional litigation.

This certainty redounds to the benefit of the judiciary as well by reducing the number of subsequent actions challenging the same or similar conduct as unconstitutional. In addition, it permits courts to swiftly dispose of unmeritorious challenges to such conduct.

By contrast, if the question of the constitutionality of the alleged conduct is avoided, "standards of

official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

2. The impact on government policies by court rulings at the first step of the *Saucier* analysis can be best appreciated through a few concrete examples.

a. In *Wilson v. Layne*, 526 U.S. 603 (1999), this Court held that it is a violation of the Fourth Amendment for police officers to bring members of the media or other third parties into a home during the execution of a warrant. The Court also affirmed the court of appeals' grant of qualified immunity to the individual officer who had been sued in that case because the law was not clearly established at the time of the alleged conduct. *Id.* at 614-615.

One of petitioners' own *amici* explains that "[o]nce this Court had condemned the practice [in *Wilson*], * * * public employers were on notice that they must train their employees to respect this now-established right to be free from what this Court had held was an unreasonable search." National Ass'n of Counties, *et al.* Br. as *Amici Curiae*, at 24.

This Court's ruling on the constitutional issue in *Wilson* has been formally incorporated in the training materials of several States. For example, the Georgia Association of Chiefs of Police *Sample Law Enforcement Policy Manual* references this Court's decision in *Wilson* and suggests that ride-along policies must include language that prohibits participants from

entering a person's home unless granted express permission by the homeowner. *See* Georgia Ass'n of Chiefs of Police, *Sample Law Enforcement Operations Manual*, (revised March 2007), *available at* http://www.gachiefs.com/DeptResrcs_SamplePolicy Manual.htm (follow "Chapter 16—Patrol Function" at 50).

The *Model Policies for Law Enforcement in Maryland* expressly recommends that law enforcement agencies examine their policies with respect to civilian ride-alongs in light of *Wilson*. *See* Maryland Police and Correctional Training Commissions, *Model Policies for Law Enforcement in Maryland*, at 39 (November 2003), *available at* http://www.mdle.net/modelpolicies05.pdf.

An instructor at the FBI Academy published an article to recommend that "[l]aw enforcement agencies should carefully craft media policies that follow the parameters established by the Supreme Court in *Wilson* * * * [and] should provide training designed to alert officers to the potential personal liability of exceeding those parameters." Kimberly A. Crawford, *Media Ride-Alongs: Fourth Amendment Constraints*, 69 FBI Law Enforcement Bulletin 28 (July 2000), *available at* www.fbi.gov/publications/leb/2000/jul00leb.pdf.

b. In *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007), a plaintiff brought a Section 1983 action against a police deputy for conducting a warrantless arrest of the plaintiff at his home by knocking and

then, after plaintiff opened the door, reaching through the open doorway without warning and grabbing plaintiff as he stood fully within the confines of his home. *Id.* at 1234-1236. The Eleventh Circuit held, at the first stop of its *Saucier* analysis, that such warrantless arrest violates the Fourth Amendment. The court affirmed the district court's grant of qualified immunity in that case, however, because the law was not clearly established at the time of the alleged conduct. *Id.* at 1248-1249.

In response, police officers in Georgia are now "trained on this point" of law and, "by following their training, they will safeguard the constitutional rights of individuals." Dawn M. Diedrich, *"Rigid Order of Battle": A Police Training Perspective on the Qualified Immunity Analysis*, The Police Chief (July 2008), *available at* http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&issue_id=72008&category_ID=3. The Deputy Director of Legal Services for the Georgia Bureau of Investigation explained that "[f]or a police trainer, [*McClish*] gives clear guidance to officers and is actually a primer for Fourth Amendment issues relating to entry into a home." *Ibid.*

c. And yet a third concrete example of *Saucier*'s positive impact on governmental policies is *Kuha v. City of Minnetonka*, 328 F.3d 427, *aff'd on reh'g*, 365 F.3d 590 (2003). As noted above, in *Kuha*, the Eighth Circuit held that the failure of police officers to warn a criminal suspect that they were about to release of a bite-and-hold trained animal violated the Fourth

Amendment. That decision was subsequently cited in a policy manual used to train law enforcement personnel as an example of how the failure to warn before releasing a dangerous animal was unconstitutional. *See* Ken Wallentine, *Street Legal: A Guide to Pretrial Criminal Procedure for Police, Prosecutors and Defenders* 270 (2007).

C. The Alternatives Proposed By Petitioners And Their *Amici* Would Increase The Already High Costs Associated With Granting Government Officials Qualified Immunity

Petitioners have not identified an alternative approach to *Saucier* that would better serve the Court's goals to ensure the development of the law and provide certainty for individuals and government officials, nor have their *amici*.

1. The qualified immunity doctrine already imposes significant costs on victims of unconstitutional conduct that weigh against overruling *Saucier*

The doctrine of qualified immunity already substantially limits the availability of remedies for persons injured by official conduct. This is a significant social cost, as "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*,

5 U.S. 137, 163 (1803). As long as this Court maintains that government officials are entitled to qualified immunity where the law is not "clearly established," it should not allow courts to further extend this immunity by leaving the law unclear.

A continued mandate for courts to follow the *Saucier* two-step analysis is necessary to maintain the balance struck by the qualified immunity doctrine "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (Kennedy, J., concurring); *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Indeed, in an appropriate case, it may be time to reassess the balance of competing values underlying qualified immunity. Qualified immunity has no anchor in the text of Section 1983. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) ("on its face" Section 1983 "admits of no immunities"). To the contrary, the creation of a federal common law of qualified immunity appears to be in significant tension with the statutory command in 42 U.S.C. § 1988(a) that state law fill any "gaps" not addressed by the text of Section 1983. *See Moor v. County of Alameda*, 411 U.S. 693, 702-706 (1973). Exercising judicial authority to create a federal common law of immunity from Section 1983 claims also is in tension with the intent of the Reconstruction Era Congress that enacted Section 1983 in 1871, which was skeptical of the federal courts' support for the goals of

reconstruction. *See* 2 Charles Warren, *The Supreme Court in United States History* 428-434, 447-454, 466-468, 474-477 (rev. ed. 1926).

Even if Congress had intended well-established common law immunities to be available to government officials in Section 1983 actions, the Court abandoned the common law in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and now relies on a standard under which it is easier for a government official to prevail than it was under common law. The Court did so by adopting a purely objective inquiry into whether an official violated clearly established law and rejecting liability even if a plaintiff can show that the government official acted with a malicious intention to deprive that individual of his or her constitutional rights. *See Anderson v. Creighton*, 483 U.S. 635, 645 (1987); *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring) ("in the context of qualified immunity for public officials * * * we have diverged to a substantial degree from the historical standards").

Furthermore, the assumptions underlying modern qualified immunity have little if any empirical basis and therefore offer weak foundations for such a broad defense. First, the primary assumption justifying qualified immunity is that government officials sued in their individual capacities pay any damage award out of their own pockets and thus potentially be overdeterred by the threat of a damages action. But indemnification of the official by his employer is, in the words of *amicus*

National Association of Counties "common in public employment." National Ass'n of Counties, *et al.* Br. as *Amici Curiae*, at 21; *see also Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., concurring); *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 850 (7th Cir. 1990) (Posner, J.) ("The [over-deterrence] justification becomes strained, however, when, as is increasingly common, the governmental entity indemnifies its employees for damages and other expenses that they incur in defending against suits that complain about their performance of official duties.").

A second assumption underlying qualified immunity is that it would be unfair to hold a government official liable in the absence of clear notice that his or her conduct is unconstitutional. The nearly universal indemnification of public officials also puts to rest this concern, however, because the money does not come from the pocketbook of the individual official. In any event, this is a virtually universal aspect of common law torts–defendants often will not know that their conduct is tortious until a jury makes that determination.

A third assumption underlying qualified immunity is that it is necessary to avoid the burdens of defending a civil rights damages action, such as the expenses of litigation and diversion of official energy from pressing public issues. But that offers weak support for such a broad qualified immunity doctrine. That is because the burdens are generally the same to the individual official whether he is sued in his

individual capacity or whether his employer is sued for the official's conduct. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and The Role of Facts in Constitutional Law*, 47 Am. U. L. Rev. 1, 25 (1997).

Until a case raises the question regarding the underlying balance struck by this Court in *Harlow*, this balance should not be pushed more heavily in favor of government officials to the detriment of remedying constitutional violations. Yet this is precisely the result of overruling *Saucier* or, as we show below, modifying it as proposed by petitioners or their *amici*. If *Saucier* were overruled, qualified immunity would not only continue to award government officials "one liability-free violation of the Constitution," it also would pave the way for "multiple bites of a constitutionally forbidden fruit." *Garcia by Garcia v. Miera*, 817 F.2d 650, 656-657 n.8 (10th Cir. 1987) (citation omitted), *cert. denied*, 485 U.S. 959 (1988).

2. The need for continued development of constitutional jurisprudence in Fourth Amendment cases, as shown by the case law, demonstrates that *Saucier* should not be abandoned in that area

Petitioners wrongly contend (Pet. Br. 57-58) that this Court should not apply the two-step approach of *Saucier* in civil cases seeking relief for Fourth Amendment violations because the adjudication of

Fourth Amendment claims in criminal cases is sufficient to generate clearly established law.

Several of the examples discussed in Parts A and B, *supra*, involved allegations of Fourth Amendment violations. If the approach required by *Saucier* had not been applied, it would not have been just the first victim who was barred relief by qualified immunity. The victims in all the subsequent cases also would have been barred relief because there would have been no clearly established law on the unconstitutionality of the challenged conduct.

Further, as the United States argues as *amicus curiae*, the need to avoid doctrinal confusion regarding the relationship between the Fourth Amendment's reasonableness standard and the qualified immunity standard makes it inappropriate to exclude claims under the Fourth Amendment from *Saucier*'s two-step approach. *See* United States Br. as *Amicus Curiae*, at 26-27.

3. Making *Saucier* discretionary ignores the failure of the earlier experience with such an approach

Petitioners' *amici* suggest revival of a system of unconstrained discretion about whether a court will address the merits of a claim of unconstitutional official conduct or, instead, address qualified immunity as a threshold question. The United States suggests that the lower courts should have "broad discretion" to decide whether to address whether a

constitutional right has been alleged prior to addressing whether the right has been clearly established. United States Br. as *Amicus Curiae*, at 30. The *amicus* brief filed by Illinois and several other States urges that lower courts be granted the "discretion to deviate from the *Saucier* rule" and allowed the "flexibility" to "resolve cases solely on the second, 'clearly established' step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so," Illinois, *et al.* Br. as *Amici Curiae*, at 27, 25, which amounts to the same uncabined discretion suggested by the United States.[2]

The findings of an empirical study of the three time periods during which this Court gave differing guidance to the lower courts on sequencing the analysis of the constitutional question and the "clearly established" step shows the problem with *amici*'s

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[2] *Amicus* Texas Association of School Boards appears to propose that the current *Saucier* two-step approach be replaced by a system where the lower court should be required to determine the merits of the constitutional issue first only if the defendant will win. *See* Texas Ass'n of School Board Br. as *Amicus Curiae*, at 2-3. That proposal would constitute a one-way ratchet that would generate determinations about what government officials may do, but would not provide any guidance about what the officials are constitutionally prohibited from doing. This would further exacerbate the burdens of existing uncertainty about constitutional rights, which "will not be spread evenly across plaintiffs and defendants alike, but will systematically disfavor the constitutional claimant." Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1559 (2007).

proposal. *See* Paul Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing & the Articulation of Constitutional Rights*, 80 U. Colo. L. Rev. (forthcoming 2009), *available at* http://ssrn.com/abstract=1218582.

This Court initially followed a hands-off approach, and provided no guidance for the lower courts on how to approach a qualified immunity case. *See id.* at 8-9. Subsequently, in cases such as *Siegert v. Gilley*, 500 U.S. 226 (1991), this Court was understood to hold that the preferred approach was for a court to first rule on whether the alleged conduct stated a constitutional violation. *See* Hughes, *supra*, at 9-10. Finally, in *Saucier*, the Court held more categorically that "the first inquiry *must* be whether a constitutional right would have been violated on the facts alleged." 533 U.S. at 200 (emphasis added).

A study comparing reported qualified immunity decisions in the federal courts of appeals during each of these three time periods shows that *Saucier*'s mandatory guidance dramatically increased the likelihood that a court granting qualified immunity would follow the merits-first approach and clarify the constitutional issue. Hughes, *supra*, at 20. In 1988, 59% of the reported qualified immunity opinions in the courts of appeals that resulted in dismissal of plaintiff's constitutional claim failed to address whether the plaintiff had established a constitutional violation. *Id.* at 24. In 1995, the courts of appeals in 35% of such cases failed to analyze the constitutional issue. *Ibid.* This pattern changed dramatically

following *Saucier*. In 2005, courts in only 2% of such cases failed to address the constitutional issue. *Ibid.*

This research suggests that *Saucier*'s mandatory sequencing has resulted in significantly greater constitutional refinement, and that any deviation from this mandate would greatly diminish courts' willingness to address constitutional issues. Thus, it demonstrates that it is the mandatory nature of *Saucier* that is key to preventing victims of repeated constitutional violations of the same or similar nature from all being barred from suit by qualified immunity.

A mandatory merits-first approach to qualified immunity analysis ensures that, although there will be no remedies against officials who violate the constitutional rights of individuals where the law is unclear, the law will not remain unclear forever. This Court should reaffirm its holding in *Saucier* in order to prevent a broader application of qualified immunity, and to maintain the balance struck by this doctrine.

CONCLUSION

For the reasons set forth above, and in the brief of respondent on the merits, the Court should not overrule *Saucier v. Katz*, 533 U.S. 194 (2001), and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Petitioners,

v.

AFTON CALLAHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL POLICE ACCOUNTABILITY PROJECT AND ASSOCIATION OF AMERICAN JUSTICE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Court should overrule *Saucier v. Katz*, 533 U.S. 194 (2001), or continue its two-step process that allows for clear constitutional lines to be drawn and prevents the development of sub-constitutional norms?

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BRIEF OF AMICI CURIAE NATIONAL POLICE ACCOUNTABILITY PROJECT AND ASSOCIATION OF AMERICAN JUSTICE [1]

National Police Accountability Project (NPAP) and Association of American Justice (AAJ) submit this brief as amici curiae for respondent under Sup. Ct. R. 37 to address the issue raised sua sponte by the Court in its order granting certiorari. Amici argue that the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should *not* be overruled.

While amici are highly critical of qualified immunity – a judicially fashioned doctrine unsupported by the text of 42 U.S.C. § 1983 or the constitutional provisions Congress enacted the statute to enforce – they urge that the Court maintain *Saucier*'s two-step process so that constitutional standards continue to be defined in civil-rights cases, and sub-constitutional standards do not become ensconced in constitutional law.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

I. INTERESTS OF AMICI CURIAE

NPAP was founded in 1999 by members of the National Lawyers Guild to combat police misconduct, and presently has more than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues relating to police misconduct for the general public, and information and resources for non-profit and community groups involved with victims of police misconduct. NPAP also supports legislative reform efforts aimed at increasing police accountability, and appears as amicus curiae in cases, such as this one, which present issues of particular importance for lawyers who represent plaintiffs in police misconduct actions.

AAJ is a voluntary, nation-wide association of trial lawyers who primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer litigation. AAJ's 50,000 attorney members are committed to upholding the civil and constitutional rights of Americans by preserving access to the courts to enforce those rights. AAJ believes that legal redress for the violation of constitutional rights not only compensates the victims of illegal conduct, but deters the violations of constitutional rights by public officials.

NPAP and AAJ members frequently prosecute claims against state and federal law enforcement officers under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and therefore regularly litigate claims of qualified immunity.

II. THE JUDICIALLY CREATED QUALIFIED IMMUNITY DEFENSE MUST BE BALANCED AGAINST THE CONGRESSIONAL INTENT TO ENFORCE CONSTITUTIONAL RIGHTS THROUGH CIVIL LITIGATION.

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that private persons can bring 42 U.S.C. § 1983 civil actions for money damages against law enforcement officers who deprive them of constitutional rights, recognizing that the statute's "purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'" *Id.* at 171. *Monroe v. Pape* "presented no question of immunity, however, and none was decided" until six years later, when the Court determined that common-law qualified immunity shielded officers from liability "if they acted in good faith and with probable cause," *Pierson v. Ray*, 386 U.S. 547, 555-56 (1967).[2]

Over the past forty years, the Court has wrestled to accommodate these competing interests. "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available

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2. The *Pierson* Court based its ruling in part on the glib observation that "a policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." 386 U.S. at 555. In fact, regardless of qualified immunity the law enforcement officer is not liable for an arrest "when he has probable cause" because in such a case there is no deprivation of a constitutional right within the meaning of section 1983.

alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982) (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978). "At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole." *Id.* at 814.

In *Harlow*, the Court refined the balance by shifting the focus of the qualified immunity inquiry from the subjective motivations of the public official – whether actions were undertaken in "good faith" – to "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Id.* at 818. "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19.

The *Harlow* rule proved easier to state than to apply in practice. Because "qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages,'" *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)) (brackets in original), it "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. Accordingly, to defeat a claim of qualified immunity "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an

official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535, n.12 (1985).

Attorneys associated with amici frequently litigate damage claims for Fourth-Amendment and other constitutional deprivations arising under myriad circumstances. Because a statute or precedent squarely on all fours is rarely available, litigation has proliferated in the lower courts over the applicable "level of generality" and the degree of clarity required for the "contours of the right" to be "apparent" for qualified immunity purposes. In the experience of amici's lawyer members throughout the United States, these determinations of whether official conduct in a particular case transgressed establish law vary widely among district judges, and renders police misconduct litigation both more burdensome and less predictable than it should be.

Perhaps more importantly, the mushrooming of the qualified immunity defense, and its focus on "clearly established law" threatens to overshadow core constitutional questions in any given litigation and frustrate the Congressional intent underlying section 1983 by obscuring rather than clarifying constitutional lines. Even more unfortunate, this judicially created doctrine has the effect of retarding the law's development, and even institutionalizing sub-constitutional conduct.

To a not insignificant extent, the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), has mitigated these problems by directing lower courts to first determine whether constitutional violations occurred before deciding whether the applicable law was clearly established for qualified immunity purposes. For the reasons set forth in the following sections, preservation of this two-step process is essential to furthering the Congressional intent underlying section 1983, and to prevent civil-rights lawsuits from undermining rather than enforcing constitutional standards.

Accordingly, amici curiae NPAP and AAJ respectfully urge that the Court retain *Saucier*'s order-of-decision mandate and affirm the Tenth Circuit's decision in this case.

III. *SAUCIER* SHOULD NOT BE OVERRULED BECAUSE MERITS-FIRST ADJUDICATION CLARIFIES FEDERAL LAW AND PROMOTES ITS DEVELOPMENT.

A. Without Merits-First Adjudication Qualified Immunity Can Become a Permanent Impediment to the Enforcement of Constitutional Rights.

At its best, qualified immunity favors later plaintiffs over earlier ones. Absent proof linking a constitutional deprivation to a public entity's policy, practice or custom, qualified immunity can erect a barrier that makes it nearly impossible for plaintiffs pressing novel but meritorious constitutional claims to prevail.[3] "Once a rule has become well-established, however, it is not only easier for later plaintiffs to show a violation, it is also harder for later defendants to assert qualified immunity. As a result, [later] plaintiffs will have a greater opportunity actually to recover for their injuries." John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L. J. 87, 90 (1999). That ability of later plaintiffs to recover when their constitutional rights are violated depends critically,

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3. "Policy, practice or custom" section 1983 claims directly against entities pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), are not subject to the qualified immunity defense. *Owen v. City of Independence*, 445 U.S. 622, 652 n.36 (1980) (The "threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates.") Expanding entity liability to allow for vicarious liability would magnify section 1983 enforcement power without increasing the liability exposure of public officials.

however, on an actual adjudication of the constitutional question raised in earlier cases; without such adjudication on the merits, later plaintiffs are left in no better position than earlier ones, and qualified immunity can serve as a permanent impediment to clarifying constitutional boundaries.

As this Court has repeatedly acknowledged, a merits-first order-of-decisionmaking allows federal courts to perform their important function of announcing what the law is. *See, e.g., Saucier*, 533 U.S. at 201 ("This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry."); *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007) ("Although this ordering contradicts '[o]ur policy of avoiding unnecessary adjudication of constitutional issues' we have said that such a departure from practice is 'necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.'") (citations omitted).

The *Saucier* rule, as *Scott* rightly noted, privileges the federal courts' role in announcing norms and clarifying murky areas of law over the prudential desire to avoid unnecessary constitutional adjudication. *See, e.g., Morse v. Frederic*, 127 S. Ct. 2618, 2641 (2007) ("often the rule violates the longstanding principle that courts should 'not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.'") (Breyer J., dissenting) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). While prudential considerations generally suggest that constitutional adjudication be avoided when a case can be resolved on other grounds,

such considerations ought to give way when other important goals are furthered by reaching the merits. In the context of qualified immunity, deciding the merits is necessary to implement the Congressional intent underlying section 1983, while still respecting the judicially crafted policy of protecting public officials from undue exposure to personal liability.

When a court considers the question of qualified immunity without considering the substantive question presented, by contrast, the law is denied clarity. *See, e.g.*, *Saucier*, 533 U.S. at 201 ("The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Virginia L. Rev. 1, 49 (2002)

> [I]f the entitlement to qualified immunity were determined before the merits of the underlying case, difficult issues and close cases would almost never be decided on the merits in damages actions. To say that a case is close is to say that the law is not well established; to say that the law is not well-established is to say that the defendant is entitled to qualified immunity; to say that the defendant is entitled to qualified immunity is to say that the Court need not resolve the merits of the close case. This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely.

John M.M. Greabe, *Mirable Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights*

Damages Actions, 74 Notre Dame L. Rev. 403, 410 (1999)

> The requirement that the allegedly violated right be clearly established at the time of the action in question tends, if not to 'freeze' constitutional law, then at least to retard its growth through civil rights damages actions. The corpus of constitutional law grows only when courts address novel constitutional questions, yet a novel claim, by definition, seeks to establish a right that is not already 'clearly established.'

If the defense of qualified immunity is consistently considered before the merits of a civil rights claim, close cases remain close cases indefinitely and later plaintiffs find themselves no better off than earlier ones. The law remains unsettled, while public officials, as well as the bench and bar, float adrift of clear constitutional standards.

The problem that avoiding constitutional clarity poses may be seen clearly in two recent First Amendment cases from the courts of appeals. In *Purtell v. Mason*, 527 F.3d 615 (7th Cir. 2008), the question was whether insults between neighbors that arguably inflicted emotional injury amounted to "fighting words" and justified an arrest, even though they would not provoke an immediate breach of the peace. The officer was entitled to qualified immunity because he could not have predicted the outcome in this case of the jurisprudence that has followed *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). If the court had not

addressed the constitutional issue first, however, the fact that the insults did not amount to fighting words would never have been clarified. Similarly, in *Fogel v. Collins*, 531 F.3d 824 (9th Cir. 2008), an officer who arrested the plaintiff based on provocative statements emblazoned on his van was entitled to qualified immunity because the court held he was not on notice that the language was protected by the First Amendment. The court's opinion elucidated that the statements were political hyperbole rather than threats, an important decision that would not have been made if the lower court had contented itself with merely announcing that the law was not clearly established. These recent cases are typical of problems that are encountered weekly in the lower federal courts, and where constitutional clarity is of overwhelming importance both to law enforcement officers and the population at large.

When courts bypass the merits and decide cases solely on the basis of whether the applicable law was clearly established, the resulting lack of clarity regarding the substance of constitutional law serves no one's interest. When the law is unclear public officials are denied the information they need to comport their conduct to the law. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)

> [I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity

> determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.

It is essential to understand the effect the decision in this case will have on police training, which is crucial to the ability of a police department to insure that its line officers obey the Constitution. Deciding cases by asking only whether the law was previously clearly established blurs the line between constitutional and unconstitutional police methods and makes the job of training officers considerably more difficult. If repeated qualified immunity decisions postpone indefinitely the resolution of whether particular conduct violates the Constitution, training officers are unable to give clear direction and instruction to patrol officers about what the Constitution requires. What they can say is that "you can't get in trouble whatever you do in this situation, because the constitutional law is unclear." This is in fact the advice that officers will receive more and more if the Court overrules the *Saucier* requirement that the constitutional issue be resolved first.

Granting qualified immunity merely tells a defendant what he or she can get away with; determining the merits of a constitutional claim clarifies standards, gives public officials an opportunity to comply, makes case outcomes more predictable for counsel, and simplifies later adjudications.

B. Merits-First Adjudication Is Crucial in Those Cases That Are Difficult to Litigate Outside of Section 1983 Damages Actions

The law-obscuring effect that would flow from abandoning *Saucier*'s merits-first adjudication is particularly problematic in those cases where the right at issue cannot be litigated in other contexts. It is unlikely, for example, that an excessive force claim can be litigated in any context other than a damages action against individual officers: standing requirements often prevent an individual from seeking injunctive relief against the use of a particular law enforcement tactic; this Court's *Monell* jurisprudence may make a civil suit against the municipality unlikely to succeed; Fourth-Amendment claims cannot be made in petitions for a writ of habeas corpus; and often a search or seizure accomplished with excessive force does not produce fruits to be challenged in a suppression hearing prior to trial. *See County of Sacramento v. Lewis*, 523 U.S. at 842 n.5 (finding that, if a court dismisses a claim on qualified immunity, resolution of the substantive issue "would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding"). In other words, there are some claims that, if they are not adjudicated in the context of a money damages action against an individual officer, cannot be adjudicated at all. In these areas, a retreat from merits-first adjudication can truly lead to an ossification of constitutional law.

It is for this reason that petitioners and at least one of their amici have acknowledged that, should this Court choose to weaken *Saucier*'s mandate in some cases, merits-first adjudication would still be appropriate in those cases that would be difficult or impossible to litigate elsewhere. Brief of Petitioner at 58 (suggesting that "[i]n Fourth Amendment cases, the *Saucier* order should be limited to claims that do not involve alleged fruits of the poisonous tree and therefore will not arise in the context of motions to suppress.") (citations omitted); Brief of Amicus Curiae National Association of Counties, et al., at 26

> Constitutional principles will never be clarified if every novel claim were met with the answer that it involved no violation of clearly established right. While some novel claims might be vindicated in cases seeking injunctive relief or suppression [of] evidence under the exclusionary rule, or attacking a municipal custom, policy, or practice, there are substantial limitations on those remedies.

Although amici NPAP and AAJ believe that *Saucier*'s order-of-decisionmaking should be retained intact for all civil rights cases – in part because damages are a preferred remedy over suppression – it respectfully requests that the Court retain the order-of-decisionmaking at least in those actions, such as excessive force cases, where there are not other contexts available for litigation of the issues.

C. Absent *Saucier*, Lower Courts Will Generally Resolve the Qualified Immunity Question Without Resolving the Merits.

Pre-*Saucier* experience demonstrated that when lower federal courts had the choice whether to adjudicate the merits of a plaintiff's constitutional claim or the defense of qualified immunity, they often chose to resolve the qualified immunity question first, leaving the constitutional question unresolved and the law obscured. See John M. M. Greabe, *Mirable Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 410 (1999) ("It . . . should not be surprising that the cases are legion where courts, in their decision-making discretion, have bypassed pleaded constitutional claims of first impression by assuming arguendo that the claims are viable and then dismissing them on qualified immunity grounds."); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, __ George Mason L. Rev. __ (forthcoming 2008)

> It is easy to see why judges would prefer to decide the remedial question first. It is . . . quite often easier to resolve the remedial question than the merits question. The downside, of course, is that such an order-of-decisionmaking privileges dispute resolution over norm announcement and risks denying deserving plaintiffs a remedy indefinitely.

In this case, notwithstanding *Saucier*'s mandate, the district court simply assumed a constitutional violation without resolving that issue. *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006) at *8

> Ultimately the Supreme Court will have to finally resolve the question of whether the [consent-once-removed] doctrine is consistent with the Fourth Amendment. For purposes of resolving this case, the simplest approach is to assume that the Supreme Court will ultimately reject the doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment.

History demonstrates that without *Saucier*'s mandate, more and more courts are likely to resolve cases as the district court did here, deciding qualified immunity question first without reaching the merits of a plaintiff's civil-rights claim. Given the choice, lower courts will likely choose the "easier" qualified immunity question rather than the more complicated substantive question. *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. at 841 n.5

> The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether

the plaintiff has alleged a deprivation of a constitutional right at all.

Empirical evidence indicates that this Court's doctrine has a powerful effect on the willingness of lower federal courts to evaluate the merits of a civil rights claim. In his study of order of decisionmaking in civil rights, one commentator examined cases from three distinct periods: before the Court initially recommended the merits-first order of decision-making in *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991), between *Siegert* and *Saucier*, and after the mandate of the merits-first approach in *Saucier*. Paul Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, University of Colorado Law Review, Vol. 80, February 2009, Available at SSRN: http://ssrn.com/abstract=1156421. He found a large difference in how often circuit courts reached the merits of a plaintiff's constitutional claims during each period. For example, in those cases in which the Court ultimately granted qualified immunity to the defendant, courts reached the merits in just over 40% of cases before *Siegert*, in 65% of cases between *Siegert* and *Saucier* and in 98% of cases decided since *Saucier*. *Id.* at 20. In other words, the effect of this Court's precedents on lower court adjudication of the merits of civil rights cases is clear: *Siegert* and *Saucier* have lead to significantly more adjudication of constitutional rights and thus to greater clarity in the substance of those rights.

This study demonstrates that lower courts have had little difficulty applying *Saucier*. If the Court were to retreat from its *Saucier* mandate, there is every reason

to believe that substantially less guidance would be provided to public officials regarding what the law expects of them and deserving plaintiffs would find it significantly more difficult to receive redress for their constitutional harms.

D. Introducing Flexibility with Regard to Order of Decisionmaking Will Needlessly Complicate Civil-Rights Litigation.

Justice Breyer has suggested permitting lower courts some flexibility with regard to the order of decisionmaking. *See Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) ("[W]e should overrule the requirement, announced in *Saucier v. Katz*, that lower courts must first decide the 'constitutional question' before they turn to the 'qualified immunity question.' Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case.") (Breyer, J., concurring) (citations omitted). Amici respectfully submit that such flexibility in this area will in practice further complicate adjudications under Section 1983 and *Bivens* without realizing any corresponding benefit.

Rather than focusing on Section 1983's central inquiry – has a person acting under color of state law violated any constitutional right of another person? – flexibility in ordering will add yet another layer to the current two-step approach to adjudicating civil rights claims. Adding this meta-issue will only add to the already inordinate complexity, expense, and delay of litigating these cases. The current rule has the strong benefit of clarity; the merits of a civil rights claim should

resolved prior to considering the defense of qualified immunity. Only in this manner can the law develop clear standards and implement the Congressional intent underlying section 1983.

IV. ABANDONING *SAUCIER*'S TWO-STEP APPROACH WILL INSTITUTIONALIZE SUB-CONSTITUTIONAL STANDARDS IN PLACE OF THE APPROPRIATE ONES.

Qualified immunity doctrine does more than deprive victims of compensation for proven constitutional violations. It operates to establish sub-constitutionals standards for future governmental conduct. This tendency is particularly true for police practices that affect many individuals. In *Anderson v. Creighton*, 483 U.S. at 640-41, the Court ruled that an officer can act in an objectively reasonable fashion while violating the Fourth Amendment's prohibition of "unreasonable searches and seizures." The Court noted that determinations of probable cause are often quite difficult and that officials should be held liable in damages only where their conduct was clearly proscribed. *Id.*

In the wake of *Anderson*, a number of circuits have routinely employed the concept of "arguable probable cause" for civil-rights cases based on wrongful search or arrest. *See, e.g., Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000) ("[S]ubjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest"); *Wollin v. Gondert*, 192 F.3d 616, 621 (7th Cir. 1999) (discussing "arguable probable cause" in the context of a qualified immunity defense). Given the fact

that probable cause can be established on facts that show only a "fair probability" of criminal conduct (a "practical, nontechnical conception"), *Illnois v. Gates*, 462 U.S. 213, 231 (1983), to permit "arguable" probable cause to justify an arrest or search is to reduce the Fourth Amendment's core protection to a very low level indeed.

The same problem arises in cases alleging excessive force. In *Saucier*, the Court determined that "[t]he inquiries for qualified immunity and excessive force remain distinct." 533 U.S. at 204. Thus an officer who reasonably, but mistakenly, believed the circumstances justified using more force than was objectively reasonable under the circumstances is entitled to immunity. Given the tension in the standard articulated by the Court, it is not surprising that lower courts have struggled in their application of qualified immunity in the use-of-force context. *See, e.g.*, *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1245 n.16 (11th Cir. 2003) (per curiam) (ruling that law was not clearly established that surprise use of pepper spray on a violent felony suspect violated Constitution); *Curley v. Klem*, 298 F.3d 271, 282 (3d Cir. 2002) (stating that historical facts had to be resolved by jury before determination of objective reasonableness could be made as to officer's shooting of another officer mistaken for suspect); *Ewolski v. City of Brunswick*, 287 F.3d 492, 505 (6th Cir. 2002) ("Even if genuine issues of material fact did exist as to whether a reasonable officer would have perceived an immediate threat . . . we would still find summary judgment to be appropriate on the basis of the 'clearly established' prong of the qualified immunity test.").

Under these cases and over time, officers will more frequently apply the lesser protection of the immunity doctrine in their street-level decisions to arrest, search, investigate, and use force. After all, if courts demand only "arguable probable cause" for a search or arrest and permit "reasonable" uses of unreasonable force, officers will face no legal sanction when applying these sub-constitutional standards. As Professor Levinson observed:

> [O]ne might doubt the extent to which governmental officials whose behavior is governed by constitutional law care much about constitutional rights except as predictors of legal risk, which is a function of remedies – especially in the context of criminal justice where there are strong normative reasons for pushing against constitutional limits.

Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 867, 911 (1999).

The *Saucier* approach protects against the development of sub-constitutional standards. Qualified immunity protects officers from liability for a specific type of unconstitutional conduct only once: with the right defined by the Court, a circuit, or even a district court, an officer can no longer claim that it was not clearly established. *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) (granting qualified immunity while establishing police cannot bring media along on the execution of search warrants); *see also*, *e.g.*, *Robinson v. Solano County*, 278 F.3d 1007, 1015-16 (9th Cir. 2002) (en banc) (granting qualified immunity while also

establishing that "pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment").

The Court has fashioned the qualified immunity defense to prevent what it has perceived as the over-deterrence of public officials who, faced with the exposure to civil liability for constitutional violations, might steer clear of the constitutional line and fail to fully enforce the law. The *Saucier* two-step approach continues protection of the officer, but provides at least some assurance against repeated constitutional violations.

CONCLUSION

For the foregoing reasons this Court's decision in *Saucier v Katz* should not be overruled. The decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Dated: August 13, 2008

Respectfully submitted,

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Supreme Court of the United States

CORDELL PEARSON, ET AL.,

Petitioners,

vs.

AFTON CALLAHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* TEXAS ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled?

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BRIEF OF *AMICUS CURIAE* TEXAS ASSOCIATION OF SCHOOL BOARDS

Texas Association of School Boards Legal Assistance Fund ("TASB Fund") appears as *amicus curiae* under SUP. CT. R. 37 to address the procedural issue raised *sua sponte* by the Court in its order granting certiorari, namely, whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled. TASB Fund supports neither party in this proceeding.

I.

Interest of *Amicus Curiae*

TASB Fund is funding the preparation of this amicus brief.[1] Nearly 800 public school districts in Texas are members of the TASB Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. TASB Fund is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("TSA"). TASB is a non-profit corporation whose members are the

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[1] Counsel for the parties did not author any part of this brief, and no party, other than TASB Fund, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and the letters of consent of both Petitioners and Respondent have been filed with the Court pursuant to Rule 37.2(a).

approximately 1,036 public school boards of the State of Texas. The members of TASB are responsible for the governance of the public schools of Texas. *See* TEX. EDUC. CODE ANN. § 11.151(b) & (d). TASB represents the State's school superintendents and other administrators responsible for carrying out educational policies adopted by their respective local school boards. TSA is composed of attorneys who collectively represent more than 90 percent of the school districts in Texas.

II.

Summary of Argument

Saucier v. Katz, 533 U.S. 194, 201 (2001) requires lower courts to decide the merits issue (prong one of the qualified immunity analysis) before deciding whether the defendant officer acted with objective good faith (prong two). TASB Fund urges this Court to overrule *Saucier*'s "rigid 'order-of-battle rule.'" *Scott v. Harris*, 550 U.S. ___, ___, 127 S. Ct. 1769, (2007) (Breyer, J., concurring). Only where it is clear on the face of the pleadings that no valid claim can be stated (as was the case in *Siegert v. Gilley*, 500 U.S. 226 (1991)), or where the summary judgment proof establishes that the plaintiff cannot prevail on the merits (as contemplated by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)), should the courts be required to address the merits prong first and thereby protect the defendant official from unnecessary or overly broad discovery. On the other hand, *Saucier* should be

overruled to the extent it requires in split-prong rulings, *i.e.*, where the defendant loses on the merits but nonetheless prevails on the issue of good faith – because such defendant has no incentive to appeal. Erroneous merits rulings are thus insulated from review and chill borderline but legal official conduct.

III.

Argument

A. *Saucier*'s Prospectivism Clashes With The Rationale For Immunity From Suit.

Prior to *Saucier*, a merits-first order of adjudicating an official's entitlement to qualified immunity was the preferred one; *Saucier* made it mandatory – whether "the facts alleged show the officer's conduct violated a constitutional right . . . *must* be the initial inquiry." 533 U.S. at 201 (emphasis added). By requiring courts to decide first whether the complaint states a valid claim, *Saucier* thus provides a "process for the law's elaboration." *Id.* Careful definition of the underlying right is valuable, regardless of whether necessary to decide the case at bar, because it guides future conduct. As this Court has stated elsewhere, "if the policy of [merits] avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998).

On the other hand, qualified immunity's purpose is not to develop constitutional law prospectively; it exists as a defense from suit for all but the most seriously incompetent actors and allows officials who act in good faith to extricate themselves from litigation "at the earliest possible stage." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). The *Saucier* Court relied on *Siegert v. Gilley*, 500 U.S. 226 (1991), for the proposition that a merits determination "must be the initial inquiry." *Saucier*, 533 U.S. at 202. *Siegert*, however, did not reach the merits first in order to warn future actors that Gilley's conduct was illegal. Consistent with the purpose of immunity from suit, *Siegert* instead requires the lower courts to dismiss a case on the pleadings and disallow discovery when the face of the complaint clearly fails to state a claim. *Siegert*'s application of the two-prong test can thus be seen as clarification on the discussion regarding that test in *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982), where the Court observed that a ruling on *either* the merits prong or the objective-good-faith prong serves to facilitate summary resolution: "On summary judgment, the judge *may* determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818 (emphasis added).

Accordingly, TASB Fund agrees with Justice Stevens's concurrence in *Lewis*:

> When defendants in a § 1983 action argue in the alternative (a) that they did not violate

> the Constitution, and (b) that in any event they are entitled to qualified immunity because the constitutional right was not clearly established, the opinion in *Siegert v. Gilley*, 500 U.S. 226 (1991), tells us that we should address the constitutional question at the outset. That is sound advice when the answer to the constitutional question is clear. When, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions.

Lewis, 523 U.S. at 859 (Stevens, J., concurring in the judgment). *Siegert* "should not be read," as Justice Breyer has added, "to deny lower courts the flexibility, in appropriate cases, to decide § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented." *Id.* at 858-59 (Breyer, J., concurring).

B. The Unreviewability Problem In Split-Prong Outcomes.

As pointed out most recently by Justice Breyer in *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (2007), various commentators, judges, and even several members of this Court have criticized and in some cases have called for the abandonment of *Saucier*'s "rigid order-of-battle rule." *Id.* at 2642-43 (Breyer, J., concurring in part and dissenting) (citing authorities). His criticisms are many: "Sometimes the

rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources. Sometimes it will require them to resolve constitutional issues that are poorly presented. Sometimes the rule will immunize an incorrect constitutional holding from further review. And often the rule violates the longstanding principle that courts should 'not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Id.* at 2641 (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

TASB Fund's concern is the unreviewability problem. *Saucier* results in split-prong rulings in which the ruling against the official on the merits is "effectively insulated from review." *Brosseau v. Haugen*, 543 U.S. 194, 202 (2004) (Breyer, J., concurring). "When a party loses on the first (interpretive) prong but nonetheless prevails on the second (notice) prong, he has no incentive to appeal." Sampsell-Jones, *Reviewing Saucier, Prospective Interpretations of Criminal Law*, 14 GEO. MASON L. REV. 725, 762-63 (Spring 2007).

As a hypothetical example, we can envision a school official being sued for refusing to fund a football program. We will assume further that the trial court holds that students have a constitutional right to play football, but that this particular official is immune because the law was not clearly established when the school official withheld funding. Because the school official will have "won" the case because he

acted in good faith – he obtained a judgment in his favor – he has no incentive to appeal the portion of the opinion that recognizes the new constitutional right. The problem, of course, is that if the decision on the merits prong is incorrect, it is nevertheless binding on everyone else; it becomes the "clearly established law" of the circuit.

Another danger with *Saucier* is that infirm constitutional rulings will occur in the context of an interlocutory appeal of summary adjudications, such as denial of a motion to dismiss. This results in constitutional rules being established in cases with little or no evidentiary record. Accordingly "[j]ust as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, *see Lewis*, 523 U.S. at 842 n.5, so there is a risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented." *Lyons v. Xenia*, 417 F.3d 565, 582 (6th Cir. 2005) (Sutton, J., concurring).

In such incorrectly decided split-prong cases, the erroneous or overly broad merits ruling will deter vigorous enforcement of the laws – a result contrary to the purpose of qualified immunity. As the Second Circuit has written in this regard:

> If those government actors defer to the courts' declarations and modify their procedures accordingly, new constitutional rights will have effectively been established by the dicta of lower courts without the defendants having the right to appellate review. Only by

> defying the views of the lower court, adhering to practices that have been declared illegal, and thus inviting new suits will the state officials be able to ensure appellate review of lower court declarations of the unconstitutionality of official conduct. Thus, officials may often be placed in the untenable position of complying with the lower court's advisory dictum without opportunity to seek appellate review, or appearing to defy the lower court's assertion and thus exposing themselves to a risk of punitive damages.

Horne v. Coughlin, 191 F.3d 244, 247-48 (2d Cir. 1999).

IV.

Conclusion

TASB Fund urges the Court to overrule *Saucier*'s order-of-battle rule in split-prong situations, where the merits ruling against a defendant official is likely to be immunized from review. *Saucier* should be upheld only to the extent a merits ruling for or against the official is clear. In other words, in overruling *Saucier*, the Court should preserve *Siegert*'s order-of-battle. An official deserves to be exonerated on the merits if it is clear that official did no wrong. A ruling on the merits ends any case that might have been brought against the employing entity too, and thus promotes the values of official immunity from suit by pretermitting any need for the plaintiff to take

witness discovery from the official that might have been brought against his employer.

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Respectfully submitted,

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